CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 **APRIL 7, 1993** **NO. 14**

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

(T.D. 93–17)

COUNTRY OF ORIGIN MARKING FOR THE CZECH REPUBLIC AND THE SLOVAK REPUBLIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: On December 31, 1992, the Czech and Slovak Federal Republic (CSFR or Czechoslovakia) ceased to exist and was succeeded by two separate and independent states, the Czech Republic and the Slovak Republic. This document notifies the public of the names and the English spellings for these two new countries that are to be used for country of origin marking on merchandise imported into the United States from the territory of the former Czechoslovakia. It also grants a grace period to permit the continued importation of merchandise from these countries marked “Czechoslovakia ” or “Czech and Slovak Federal Republic.”

EFFECTIVE DATE: March 23, 1993.

FOR FURTHER INFORMATION CONTACT: Keith B. Rudich, Office of Regulations and Rulings, (202–482–7010).

SUPPLEMENTARY INFORMATION:

Background

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Customs has authority pursuant to 19 U.S.C. 1304 to determine the character of the words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and to require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of an article.

As of January 1, 1993, the United States recognized the Czech Republic and the Slovak Republic as independent countries. Accordingly, articles imported from the former Czechoslovakia are subject to marking with the English name of the independent countries from which they originate. The United States Department of State has indicated that the English names and the correct spellings of these new independent countries are:

Long form name	*Short form name*
Czech Republic	(No current short form.)
Slovak Republic	Slovakia.

Marking an article with either the short form name or the long form name is acceptable. If either of the long form names are used, the abbreviation "Rep." may be used for "Republic".

Customs recognizes that manufacturers and importers may need time to adjust to these changes and that an abrupt change in the marking requirements could cause undue hardship. Therefore, goods made in the former Czechoslovakia will be accepted as properly marked if they are marked with any of the names previously approved: *e.g.* "Czechoslovakia," "Czech and Slovak Federal Republic", or the abbreviation "Czech."; or the new appropriate country designation: "Czech Republic", "Slovak Republic", or "Slovakia". Such names will be acceptable until January 1, 1994. All goods produced in the Czech Republic or the Slovak Republic and imported on or after January 1, 1994, will be required to be marked as a product of the particular country from which they originate as set forth above.

Dated: March 3, 1993.

KAREN J. HIATT,
Acting Assistant Commissioner,
Commercial Operations.

[Published in the Federal Register, March 23, 1993 (58 FR 15519)]

19 CFR Parts 19, 111, 112, 122, and 146

(T.D. 93–18)

SUBMISSION OF FINGERPRINTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends several parts of the Customs Regulations to clarify Customs position regarding the submission of fingerprints when applying for certain occupations or requesting various identification cards which necessitate a fingerprint records check. Moreover in this connection, where permissible, a fee will be collected to recover both the fee now charged Customs by the Federal Bureau of Investigation for performing the fingerprint check, and Customs administrative costs. The amendments will allow Customs to continue providing, in a cost-effective manner, services which necessitate a fingerprint records check.

EFFECTIVE DATE: May 24, 1993.

FOR FURTHER INFORMATION CONTACT: Esther Mandelay, Office of Inspection and Control, (202–927–0520).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to a provision in Public Law 101–162, the Federal Bureau of Investigation (FBI) was authorized to establish a fee for processing fingerprint identification records for non-law enforcement employment and licensing purposes. This authorization is mentioned in a note to 28 U.S.C.A. 534 and indicates that the provision concerning fees was reenacted in Public Law 101–515.

On January 1, 1990, the FBI began charging Customs a $14.00 user fee whenever the fingerprints of various applicants for Customs related occupations or identification cards were submitted for processing. On October 1, 1990, the fee was raised to $17.00. Customs sought exemption from the fee, but the FBI denied the request on the basis that the underlying reason for the check was employment or licensing purposes.

Accordingly, by notice published in the Federal Register on December 11, 1991 (56 FR 64580), amendments were proposed to the Regulations which would allow Customs to charge a fee to recover the $17 charged Customs by the FBI, plus an additional 15% of that amount to cover Customs administrative overhead. Customs may assess such a fee pursuant to 31 U.S.C. 9701. Thus, the total charge would be $19.55, which consists of $17 (the FBI fee) plus $2.55 (15% to cover overhead). However, this fee would change whenever the amount charged by the FBI changes. District directors would inform those required to submit the

fee in the correct amount. At present, Customs estimates that it may be billed more than $1 million per year by the FBI for fingerprint checks considered necessary to carry out Customs duties.

The proposed amendments would permit the recovery of these costs, together with Customs administrative overhead, whether the submission of fingerprints is required with the particular application, or whether it is a matter for the district director's discretion.

In this regard, under the proposed amendments, the submission of fingerprints either could, or would, be required, as applicable, from those wanting to establish a bonded warehouse (§ 19.2) or obtain a broker's license (§ 111.12), from licensed cartmen, lightermen or employees thereof needing an identification card (§ 112.42), and from those seeking to gain unescorted access to Customs security areas at an airport (§ 122.182) or activate a foreign trade zone (§ 146.6). The fingerprint fee would be due from broker applicants who pass the related examination (§ 111.96), from licensed cartmen, lightermen and employees thereof, as part of an application to secure an identification card (§ 112.42), and from those seeking unescorted access to Customs security areas at an airport (§ 122.182), but pursuant to 19 U.S.C. 58c(e)(6)(C)(i) and (ii), Customs would be effectively precluded from collecting the fee from those establishing a warehouse or activating a zone.

Thirty-nine commenters from the public responded to the notice of proposed rulemaking. A description, together with Customs analysis, of the issues they raised, is set forth below.

Analysis of Comments

Comment:

By far, the majority of commenters responding to the notice of proposed rulemaking focused on the Customs Airport Security Program, and proposed § 122.182, which would require the submission of fingerprints, along with the related fee, for those seeking unescorted access to Customs security areas at airports.

Many of these commenters recommended that Customs delay or defer action on the proposed amendment and, in order to avoid redundancies in the cost and processing of fingerprints, coordinate its program with the one to be implemented by the Federal Aviation Administration (FAA) under the Aviation Security Act of 1990, which requires a criminal history records check for those wanting unescorted access to and around domestic, as well as foreign, air carrier aircraft. It was stated that almost every person applying for Customs access would already have been fingerprinted under the FAA program, once implemented, and that both Customs and the FAA could achieve their goals through a single, joint program. One commenter declared that its airport charged a fee for conducting its own criminal background and fingerprint records check, and, thus, both the FAA and Customs programs were redundant.

A few commenters asserted that airport operators should be exempt from payment of fingerprint fees, because they assist federal inspection agencies in their respective duties. One commenter suggested that it would be costly to fingerprint the high number of emergency response personnel who must have access to Customs security areas. Another commenter thought that the proposed rule would have a significant impact on small businesses under the Regulatory Flexibility Act, and that it constituted a major rule under Executive Order (E.O.) 12291.

Response:

Customs has concluded that it would not be advisable to delay or defer action on the final rule at this time pending FAA implementation of its program, inasmuch as it is important that Customs be able to recover, as soon as possible, the fees currently charged by the Federal Bureau of Investigation (FBI) on fingerprints Customs submits pursuant to its Airport Security Program. It is also believed that the final rule will serve to reduce confusion with the FAA regulations (14 CFR Parts 107 and 108).

However, although it was initially proposed to require the submission of fingerprints, in all cases, as part of an application to obtain unescorted access to Customs security areas at an airport, Customs believes it prudent, upon further consideration, to simply retain the existing practice of requiring their submission, when found necessary in the discretion of the district director. Section 122.182(d) is therefore changed simply to make it clear that it is the district director who may require the submission of fingerprints from a given applicant, and that he may do so either at the time of, or following, the filing of the application. Such decisions are often based on different mission requirements than those of the FAA, or of a private airport operator. The overriding purpose of the regulation, therefore, is to permit Customs to recoup both the fee charged it by the FBI for submitting the fingerprint cards, plus its own administrative overhead.

Nevertheless, Customs agrees that it needs to coordinate with the FAA to avoid redundancies, and is committed to taking action in this respect, which would minimize or eliminate any redundancies once the FAA program is fully operational, and Customs is satisfied that its own requirements are addressed by the FAA program. In fact, Customs has endeavored to work extensively with the FAA towards the goal of interfacing with its prospective program, in order to obviate redundancies in the costs and processing of background criminal investigations. However, Customs wants to ensure that the criminal background checks required by the FAA will fulfill its requirements in relation to persons seeking access to Customs-secured areas. Customs will continue to seek to interface with the FAA program, but until such time as that goal is reached, it must ensure that adequate safeguards exist in Customs security areas.

The expenses incurred in necessary background fingerprint records checks of airport or air carrier employees needing access, for whatever reason, to Customs security areas are properly reimbursable to

Customs. Such employees do not perform Customs functions, nor do they perform the functions of any federal border inspection agency. The duties which they perform are those relative to the operations of the airport and the airlines. It is also observed that Customs has contingency plans in place at airports to address emergency response personnel who must have access to Customs security areas. In any event, it is estimated that in the Airport Security Program roughly a total of 60,000 fingerprint cards from personnel seeking unescorted access to Customs security areas may be processed annually, at a cost of approximately $1.2 million.

A certification was previously made by the agency in the notice of proposed rulemaking (56 FR at 64581), from which no persuasive reason has been given to depart, that the amendment would neither have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, nor constitute a major rule within the contemplation of E.O. 12291, thereby removing the rule from the regulatory analysis requirements of those laws. Parenthetically, such determinations fall within the exclusive, nonreviewable province of the agency.

Comment:

Several commenters objected to the proposed change to § 146.6, which would include the possible submission of fingerprints as part of an application to activate a foreign trade zone. Some of these commenters also asked for an extension of the comment period so that they could examine the proposed amendment in greater depth.

Response:

Customs intent by this regulation is not to change its policy or practice regarding the submission of fingerprints for foreign trade zone grantees or operators. Customs already has the authority to require fingerprints in this connection. The regulation merely clarifies this existing authority, and thus does not create an undue burden for these parties. In light of this, and inasmuch as there is no fee requirement under § 146.6, it was decided that no extension of the comment period was warranted here.

Conclusion

After careful consideration of the comments received and further review of the matter, it has been determined that the amendments, modified as discussed above, should be adopted. In addition, § 111.12 is changed to confirm that it is likewise the district director who has the discretion to require the submission of fingerprints from broker applicants. Also, for editorial consistency, "will" is changed to "shall" in the last sentence of § 111.96(a), the third sentence of § 112.42, and the sixth sentence of § 122.182(d).

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments will not have a significant economic impact on a substantial number of small entities. It is the applicant himself who would be responsible for paying the fee. Thus, the amendments are not subject to the regulatory requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Drafting Information

The principal author of this document was Russell Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 19

Customs duties and inspection, Imports, Exports, Surety bonds, Warehouse.

19 CFR Part 111

Customs duties and inspection, Imports, Administrative practice and procedures, Brokers.

19 CFR Part 112

Customs duties and inspection, Imports, Administrative practice and procedures, Common carriers, Exports, Freight forwarders, Motor carriers.

19 CFR Part 122

Customs duties and inspection, Imports, Air carriers, Airports.

19 CFR Part 146

Customs duties and inspection, Imports, Exports, Foreign trade zones.

Amendments to the Regulations

For the reasons set forth in the preamble, Parts 19, 111, 112, 122 and 146, Customs Regulations (19 CFR Parts 19, 111, 112, 122, and 146), are amended as set forth below.

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for Part 19 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624.

2. Section 19.2 is amended by adding a sentence to the end of paragraph (f) to read as follows:

§ 19.2 Application to bond; bond; annual fee.

* * * * * * *

(f) * * * The district director may require an individual applicant to submit fingerprints on Standard Form 87 at the time of filing the application, or in the case of applications from a business entity, may require the fingerprints, on Standard Form 87, of all officers and managing officials of the business entity.

* * * * * * *

PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1624, 1641, unless otherwise noted.

* * * * * * *

Section 111.96 also issued under 31 U.S.C. 9701.

2. Section 111.12 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 111.12 Application for license.

(a) * * * The district director may require the applicant to submit fingerprints on Standard Form 87 at the time of filing the application, or after the applicant obtains a passing score on the broker examination.

* * * * * * *

3. Section 111.96 is amended by revising the heading of paragraph (a) and adding two sentences at the end thereof to read as follows:

§ 111.96 Fees.

(a) *License fee; fingerprint fee.* * * * Applicants receiving notice that they achieved a passing score on an examination are then liable for payment of a fingerprint fee. The district director shall inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be paid to Customs before further processing of the application shall occur.

* * * * * * *

PART 112–CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. Section 112.42 is amended by revising it to read as follows:

§ 112.42 Application for identification card.

An application for an identification card required pursuant to § 112.41 of this part, shall be filed personally by the applicant with the district director on Customs Form 3078 together with two 1 1/4″ x 1 1/4″ color photographs of the applicant. The fingerprints of the applicant shall also be required on Standard Form 87 at the time of filing the application. The district director shall inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be tendered with the application. The application may be referred for investigation and report concerning the character of the applicant.

PART 122–AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644, 49 U.S.C. App. 1509.

2. Section 122.182 is amended by revising the fifth sentence of paragraph (d) and adding a sentence immediately thereafter. The remainder of the paragraph is unchanged. The revised paragraph reads in pertinent part as follows:

§ 122.182 Security provisions.

* * * * * * *

(d) * * * The district director may require the applicant to submit fingerprints on form FD-258 either at the time of, or following, the filing of the application. If required, the district director shall inform the applicant of the current Federal Bureau of Investigation user fee for conducting fingerprint checks and the Customs administrative processing fee, the total of which must be tendered with the application. * * *

* * * * * * *

PART 146–FOREIGN TRADE ZONES

1. The general authority citation for Part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a-u, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. Section 146.6 is amended by adding three sentences to the end of paragraph (a) to read as follows:

§ 146.6 Procedure for activation.

(a) *Application.* * * * The district director may also require the operator or grantee to submit fingerprints on Standard Form 87 at the time of filing the application. If the operator is an individual, that individual's fingerprints may be required. If the operator or grantee is a business entity, fingerprints of all officers and managing officials may be required.

* * * * * * *

CAROL HALLETT,
Commissioner of Customs.

Approved: January 8, 1993.
NANCY WORTHINGTON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, March 24, 1993 (58 FR 15770)]

(T.D. 93–19)

RESCISSION OF TRADE NAME: "MODULAR COMPUTER SYSTEMS, INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Rescission of trade name "Modular Computer Systems, Inc."

SUMMARY: On November 27, 1992, a notice of recordation for the trade name "Modular Computer Systems, Inc." was published in the Federal Register (57 FR 56402). The notice advised that the trade name was used by MODULAR COMPUTER SYSTEMS, INC., a/k/a Modcomp, in connection with computers, computer peripherals, computer programs and computer systems, all manufactured in the United States.

Following the publication of the notice of recordation, Customs was made aware that a prior recordation, effective December 18, 1991, had been made with the Customs Service for the trademark "MODULAR COMPUTER SYSTEMS, INC." (U.S. Trademark Registration No. 1,648,688).

The Customs Regulations at 19 CFR 133.11 provide that "[w]ords and designs used as trademarks, whether or not registered in the U.S. Patent and Trademark Office shall not be accepted for recordation as a trade name." Inasmuch as the trade name "MODULAR COMPUTER

SYSTEMS, INC." is used (and registered) as a trademark, the recordation of "MODULAR COMPUTER SYSTEMS, INC." as a trade name was in error. Customs therefore rescinds the recordation of "MODULAR COMPUTER SYSTEMS, INC." as a trade name. The recordation of the trademark "MODULAR COMPUTER SYSTEMS, INC.", TMK 91–00664, remains in effect.

EFFECTIVE DATE: March 24, 1993.

FOR FURTHER INFORMATION CONTACT: Karl Wm. Means, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW, Franklin Court, Washington, D.C., 20229 (202) 482–6960.

Dated: March 18, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, March 24, 1993 (58 FR 15896)]

(T.D. 93–20)

RECORDATION OF TRADE NAME: "WEMCO, INC."

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: On Friday, November 27, 1992, a notice of application for the recordation under Section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "WEMCO, INC.," was published in the Federal Register (57 FR 56402). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation and received no later than January 26, 1993. No responses were received in opposition to the notice.

Accordingly, as provided in Section 133.14, Customs Regulations (19 CFR 133.14), the name "WEMCO INC.," is recorded as the trade name used by Wemco Inc., a corporation organized under the laws of the State of Louisiana, located at 966 South White Street, New Orleans, Louisiana 70125.

The trade name is used in connection with mens and boys neckties, ready ties, bow ties, ties and handkerchief sets and formal wear.

EFFECTIVE DATE: March 24, 1993.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., Washington D.C. 20229 (Franklin Court) (202–482–6960).

Dated: March 18, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, March 24, 1993 (58 FR 15896)]

19 CFR Parts 141 and 178

(T.D. 93–21)

ELIMINATION OF SPECIAL SUMMARY STEEL INVOICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to eliminate the Special Summary Steel Invoice (SSSI). The SSSI was originally designed for use in administering the trigger price mechanism as an enforcement procedure under the Antidumping Act of 1921, as amended. This amendment is being made because the trigger price mechanism is no longer being used and the SSSI is not needed for any other purpose.

EFFECTIVE DATE: April 26, 1993.

FOR FURTHER INFORMATION CONTACT: Frank Crowe, Textiles and Metals Branch, Trade Programs Division, Office of Trade Operations (202) 927–0162.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Treasury Decision 78–53, published in the Federal Register on February 13, 1978 (43 FR 6065), amended section 141.89, Customs Regulations (19 CFR 141.89), by adding a new paragraph (b) to require that a special invoice be presented to Customs for each shipment of certain steel articles having an aggregate purchase price of a minimum dollar amount. The information provided by this special invoice, designated the Special Summary Steel Invoice (SSSI), Customs Form 5520, was originally used to implement the so-called trigger price mechanism. Un-

der this procedure, trigger prices for certain steel mill products were established as the basis upon which imports of such products could be monitored for purposes of determining whether investigations under the Antidumping Act of 1921, as amended, were appropriate.

The value-based trigger price mechanism was replaced by a series of quantitative restrictions on steel imports, the last of which expired on March 31, 1992. Therefore, the SSSI no longer has any use. Elimination of the Special Summary Steel Invoice will provide monetary and manpower savings both for the Federal Government and for the trade community. Accordingly, section 141.89 is being amended by removing paragraph (b). In addition, a conforming change is being made to section 178.2, Customs Regulations (19 CFR 178.2), to reflect the removal of this information collection requirement.

Inapplicability of Public Notice and Comment Procedures

Because this amendment reduces the regulatory paperwork burden on the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedures are unnecessary and contrary to the public interest.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required by 5 U.S.C. 553(b) or any other law, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Order 12291

Because this document does not meet the criteria for a "major rule" as specified in E.O. 12291, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was James A. Seal, Metals and Machinery Classification Branch, Office of Regulations and Rulings, U.S. Customs Service.

List of Subjects

19 CFR Part 141

Customs duties and inspection, Imports, Invoice requirements.

19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collection of information.

Amendment to the Regulations

Parts 141 and 178, Customs Regulations (19 CFR Parts 141 and 178), are amended as set forth below:

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Subpart F also issued under 19 U.S.C. 1481;

* * * * * * *

2. Section 141.89 is amended by removing paragraph (b).

PART 178—APPROVAL OF
INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by removing the listing for section 141.89(b).

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: February 9, 1993.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 26, 1993 (58 FR 16349)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 113

AUTOMATED SURETY INTERFACE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of comment period.

SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the proposal to amend the Customs Regulations to provide for an automated system, the Automated Surety Interface (ASI), through which participating sureties will electronically provide to Customs acknowledgement that they are liable for transactions identified under their bonds. The comment period is being extended another 30 days.

DATE: Comments are requested on or before April 22, 1993.

ADDRESS: Comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 and inspected at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C..

FOR FURTHER INFORMATION CONTACT: Diane Hundertmark, Office of Automated Commercial Systems (202–927–0355).

SUPPLEMENTARY INFORMATION:

A document was published in the Federal Register (58 FR 5680) on January 22, 1993, proposing to amend the Customs Regulations to provide for an automated system, the Automated Surety Interface (ASI), through which participating sureties will electronically provide to Customs acknowledgement that they are liable for transactions identified under their bonds. Through ASI, Customs will be able to systemically establish and verify that a surety has recognized its bond liability under an identified bond and participating sureties will be provided certain capabilities to obtain timely information regarding the status of individual transactions for which they have a recognized liability. Customs solicited comments on the proposal and comments were due by March 23, 1993. Customs is particularly interested in receiving comments re-

garding the data elements that are being proposed to be provided to sureties.

Customs has received a request to extend the comment period because additional time is required to prepare reasonably responsive comments due to the disruption to business that the World Trade Center explosion caused to companies involved with Customs bonds. Customs believes the request has merit. Accordingly, the period of time for the submission of comments is being extended 30 days.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 1.4), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the address stated above.

Dated: March 25, 1993.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, March 30, 1993 (58 FR 16632)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–34)

BOUSA, INC., FORMERLY KNOWN AS BULK OIL (USA), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–12–00658 and 90–12–00658–S

Defendant moves to sever and dismiss for lack of jurisdiction seven entries because plaintiff has not paid liquidated duties prior to commencing this action. Plaintiff is in bankruptcy. *Held:* The case is dismissed for lack of jurisdiction.

(Decided March 15, 1993)

Herbert Peter Larsen, (*Herbert Peter Larsen*) for plaintiffs.
Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Carla Garcia-Benitez*) for defendant.

OPINION

MUSGRAVE, *Judge:* This case is before the Court on plaintiff's motion to suspend the case and the government's cross-motion to sever and dismiss in part for lack of jurisdiction. The Court finds that it is without jurisdiction over seven entries. Those entries are therefore severed and designated as Court No. 90–12–00658S. Court No. 90–12–00658S is dismissed. Plaintiff's motion for suspension of the remaining entries is denied.

Plaintiff invokes the jurisdiction of the Court under 28 U.S.C. § 1581(a), to contest the Customs Service action denying thirteen protests of the liquidation of nineteen entries. The protests were timely filed.

On December 29, 1989, plaintiff filed for bankruptcy protection under Chapter 11. On June 15, 1990, the Customs Service denied all thirteen protests. Plaintiff timely filed for review in this Court, but plaintiff's bankruptcy prevented it from paying the increased liquidated duties for seven of the entries prior to commencing this action. *Memorandum In Opposition To Defendant's Motion To Dismiss,* at 1, 2. The seven entries for which duties have not been paid are:

Protest No.	*Entry No.*
1001–6–019207	85–402331–4
1001–6–017992	85–402332–7
1001–7–001137	86–240394–2
1001–7–001457	86–240442–0
1001–7–001457	86–240476–3
1001–7–009937	86–312404–2
1001–6–012395	86–101172–0

This Court has exclusive jurisdiction over any civil action commenced to contest the denial of a protest under section 515 of the Tariff Act of 1930. 28 U.S.C. § 1581(a). However, such an action may be commenced only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced. 28 U.S.C. § 2637(a). This requirement is strictly applied, and the statute precludes any exercise of discretion by the Court. *Penrod Drilling Co. v. United States,* 13 CIT 1005, 1007, 727 F. Supp. 1463, 1465 (1989). The statute does not contain an exception for plaintiffs in bankruptcy. Accordingly, the Court has no jurisdiction over the entries listed, and those entries must be dismissed from plaintiff's action.

Plaintiff argues that the Customs Service denial of the protests violated 11 U.S.C. § 362, which provides for an automatic stay of "the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." A similar conclusion was drawn in *In re Apex Oil Company,* 131 Bankr. 712, 1991 U.S. Dist. Lexis 12,701 (E.D. Mo. 1991). The *Apex* court concluded that post-petition actions taken by Customs, including denial of a protest involving repayment of excess drawback, violated the automatic stay and were thus null and void.

Any ruling on the merits of the protest must be made by this Court under § 1581(a). Nevertheless, a claim asserting that post petition actions of the Customs Service were void *ab initio* under § 362 does not address the merits of the protest and, perhaps, is not asserted to "contest the denial of a protest" under § 1581(a). Jurisdiction of that issue may therefore lie in this Court or in the bankruptcy court under a provision other than § 1581(a). Plaintiff asserts no such other basis for the present action, and the Court declines to search for one *sua sponte.*

Accordingly, the listed entries are severed from the present action, and are designated as Court No. 90–12–00658S. Court No. 90–12–00658S is dismissed. The Court further denies plaintiff's motion to suspend the remaining cases under *Enron Oil Trading & Transportation Company v. United States,* Court No. 87–09–00935, because the *Enron* case has been decided.

(Slip Op. 93–35)

SURAMERICA DE ALEACIONES LAMINADAS, C.A., CONDUCTORES DE ALUMINIO DEL CARONI, C.A., INDUSTRIA DE CONDUCTORES ELECTRICOS, C.A., AND CORPORACION VENEZOLANA DE GUAYANA, PLAINTIFFS *v.* UNITED STATES, U.S. INTERNATIONAL TRADE COMMISSION, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND SOUTHWIRE CO., DEFENDANT-INTERVENOR

Court No. 88–09–00726

(Decided March 15, 1993)

Public Version:

[Plaintiffs contested affirmative antidumping and countervailing duties determinations and orders resulting from a petition filed by a single company of the relevant domestic industry. *Held:* The International Trade Commission's threat of injury determination was not based on substantial evidence or otherwise in accordance with law. Accordingly, this matter is remanded to the International Trade Commission for a further explanation of its findings with regard to the lack of industry support for the petition and the availability of world market supplies of aluminum; or in the alternative, a rescission of its finding of threat of injury.]

Arnold & Porter (*Patrick F.J. Macrory, Michael Faber, Claire E. Reade*); *Shearman & Sterling* (*Thomas B. Wilner, Jeffrey M. Winton*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*M. Martha Ries Michael Kane*); *Lynn M. Schlitt,* General Counsel, United States International Trade Commission; *Robert H. Brumley,* General Counsel, U.S. Department of Commerce for defendants.

Wigman, Cohen, Leitner & Myers, P.C. (*Victor M. Wigman, Ralph C. Patrick, Dorothy H. Patterson*); *Mckenna, Conner & Cuneo* (*Peter Buck Feller, Lawrence J. Bogard*) for defendant-intervenor.

Baker & McKenzie (*William D. Outman II, Arthur L. George*) for General Electric Co., *Amicus Curiae* in support of plaintiffs.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge:* Plaintiffs, Suramerica de Aleaciones Laminadas, C.A. ("Sural"), Conductores de Aluminio del Caroni, C.A. ("Cabelum"), Industria de Conductores Electricos, C.A. ("Iconel") and Corporacion Venezolana de Guayana ("CVG") seek review of the determination of the U.S. Department of Commerce, International Trade Administration ("Commerce" or "ITA") resulting in antidumping duties assessed against them. Plaintiffs also seek review of the determination of the U.S. International Trade Commission (the "Commission" or "ITC") that an industry in the United States is threatened with material injury by reason of imports from Venezuela of electrical conductor aluminum redraw rod ("EC rod" or "rod"), which the Department of Commerce has determined are being subsidized and sold at less than fair value ("LTFV").

The administrative determinations made by Commerce under review are *Certain Electrical Conductor Aluminum Redraw Rod from Venezuela (Final Affirmative Antidumping Duty Determination),* 53 Fed. Reg. 24755 (June 30, 1988) and *Certain Electrical Conductor Aluminum Redraw Rod from Venezuela (Final Affirmative Countervailing Duty*

Determination), 53 Fed. Reg. 24763 (June 30, 1988). The administrative determination made by the ITC is based upon the record developed in the following investigations: *Certain Electrical Conductor Aluminum Redraw Rod from Venezuela,* Invs. Nos. 701–TA–287 (Final) and 731–TA–378 (Final), USTIC Pub. 2103 (Aug. 1988).

BACKGROUND[1]

The relevant industry consisted of seven U.S. producers of EC rod and wire and cable at the time of the petition: Alcan Aluminum Corp. ("Alcan"), Aluminum Company of America ("Alcoa"), Essex Wire and Cable ("Essex"), Kaiser Aluminum and Chemical Corp. ("Kaiser"), Noranda Aluminum, Inc. ("Noranda"), Reynolds Metal Company ("Reynolds") and Southwire Company ("Southwire"). Of these seven, Kaiser and Noranda left the wire and cable business during the period of investigation, leaving a total "industry" of five producers. *Staff Report,* ITC Doc. 21, List 2, at A–29 – A–31.

On July 14, 1987, Southwire filed petitions with Commerce and the ITC alleging that electrical conductor redraw rod imported into the United States from Venezuela was being subsidized and sold at less than fair value. Southwire further alleged that sales of this product were causing material injury or a threat of material injury to an industry in the United States.

Plaintiffs, Sural, Cabelum, and Iconel challenged the final determination of the ITC pursuant to 19 U.S.C. § 1673(b)(i)(A)(ii) (1982) that an industry in the United States is threatened with material injury by reason of imports of EC Rod from Venezuela, and the determination of the ITA of sales at less than fair value pursuant to 19 U.S.C. § 1673d(a) (1982). This Court held that Southwire did not have standing to file its petition on behalf of the industry, because Southwire was not a majority producer in the industry and no other company in the industry supported the petition, and because one major domestic producer, along with the union representing EC rod workers and the Aluminum Trade Council, *challenged* the petition. *See Suramerica de Aleaciones Laminadas, C.A. v. United States,* 14 CIT 560, 746 F. Supp. 139 (1990). The Court of Appeals for the Federal Circuit reversed, holding that Commerce could proceed with investigations based on the Southwire petition so long as the majority of industry did not affirmatively oppose it. *See Suramerica de Aleaciones Laminadas, C.A. v. United States,* 14 CIT 560, 746 F. Supp. 139 (1990), *rev'd and remanded,* 966 F.2d 660 (Fed. Cir. 1992). The case is now before this Court on its merits, pursuant to plaintiffs' original motion for review of administrative determinations upon the agency record under Rule 56.1.

In challenging the affirmative determinations and the outstanding orders, plaintiffs assert the existence of several procedural and substantive flaws in the administrative proceedings and resulting determina-

[1] For a detailed description of the background to this case as well as administrative procedures, *see Suramerica de Aleaciones Laminadas, C.A. v. United States,* 14 CIT 560, 746 F. Supp 139 (1990).

tions below. Plaintiffs allege that the finding by the ITC of a threat of injury to United States producers of like products from imports of EC rod from Venezuela was "based in part on last-minute allegations submitted in violation of the Commission's Rules and without opportunity for rebuttal." *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record* ("Plaintiffs' Brief") at 39. Plaintiffs also argue that the affirmative threat-of-injury determinations were "erroneous as a matter of law" in that the supporting factual finding allegedly are conjectural. *Id.* at 43. *See* 19 U.S.C. § 1677(7)(F)(ii). Additionally, plaintiffs argue that Commerce's "finding that Sural's sales were made at less-than-fair-value prices was incorrect" in that Commerce improperly rejected information supplied by Sural, relying instead on "best information available" ("BIA"), and made "additional clerical and factual errors." *Id.* at 70–84. Finally, plaintiffs argue that the countervailing duty determination was unjust because the net effect of the subsidy—a preferential exchange rate—did not raise plaintiffs' mandatory exchange rate above the free market rate.

The Court need not decide the propriety of Commerce's determination because this Court rejects the ITC's threat of injury finding. This case is remanded to the ITC for a further explanation of how it arrived at its conclusions in the ITC Final Report; or in the alternative, a rescission of its finding of threat of injury.

Standard of Review

In reviewing injury, antidumping, and countervailing duty investigations and determinations, this Court must hold unlawful any determination unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 95 L.Ed. 456, 71 S. Ct. 456 (1951) (*quoting Consolidated Edison Co. v. Labor Board,* 305 U.S. 197, 229 (1938)). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 619–20, 16 L.Ed. 2d 131, 141, 86 S. Ct. 1018, 1026 (1966) (citations omitted); *See also, Matsushita Electric Industrial Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). The court may not substitute its judgment for that of the agency when the choice is between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo. American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (*citing Universal Camera,* 340 U.S. at 488), *aff'd sub nom., Armco, Inc. v. United States,* 760 F.2d 249 (Fed. Cir. 1985).

Moreover, substantial evidence supporting an agency determination must be based on the whole record. *See Universal Camera Corp.,* 340 U.S. 474, 488, 71 S. Ct. 456, 95 L.Ed. 456 (1951). The "whole record"

means that the court must consider both sides of the record. It is not sufficient to examine merely the evidence that sustains the agency's conclusion. *Id.* In other words, it is not enough that the evidence supporting the agency decision is "substantial" when considered by itself. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Universal Camera Corp.,* 340 U.S. at 478, 488.

The precise way in which courts review agency findings cannot be imprisoned within any form of words; new formulas attempting to rephrase the old are not likely to be helpful than the old. There are no talismanic words that can avoid the process of judgment. *Universal Camera Corp.,* 340 U.S. at 489.

THREAT OF MATERIAL INJURY

The Commission makes its determinations regarding the existence of a threat of material injury to domestic industry based on the record developed in the subject investigation pursuant to sections 705(b) and 735(b) of the Tariff Act of 1930, 19 U.S.C. § 1671d(b) and § 1673d(b). This Court must be especially vigilant of the *threat* of material injury determination mechanism because the Commission's inquiry by its very nature endeavors to predict events that have not yet occurred. *Cf. Rhone Poulenc, S.A. v. United States,* 8 CIT 47, 50, 592 F. Supp. 1318, 1321 (1984) (threat of injury arises in an area of the law which is far from "cut and dry").

In order to make a final affirmative determination in its injury investigation, the ITC must find that an industry in the United States: (1) is materially injured or (2) is threatened with material injury or (3) the establishment of an industry is materially retarded, by reason of the imports being sold or likely to be sold at LTFV. *See* 19 U.S.C. § 1673d(b)(1) (1982). Any determination by the Commission that an industry in the United States is threatened with material injury shall be made on the basis of evidence that the threat of material injury is "real and that actual injury is imminent." 19 U.S.C. § 1677(7)(F)(ii) (1982 & Supp. 1992); *Cf. Republic Steel Corp. v. United States,* 8 CIT 29, 41, 591 F. Supp. 640, 650 (1984) ("The essence of a threat lies in the ability and incentive to act imminently."). Moreover a determination "may not be made on the basis of mere conjecture or supposition." 19 U.S.C. § 1677(7)(F)(ii) (1982 & Supp. 1992). The statute sets forth a series of factors the Commission is to consider in analyzing the issue of threat of material injury. 19 U.S.C. § 1677(7)(F). Among relevant factors in this section are the following:

> (I) if a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),
>
> (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury * * *.

Further guidance is provided by section 1677(7)(A)–(C) regarding material injury. Material injury means harm which is not inconsequential, immaterial, or unimportant. 19 U.S.C. § 1677(7)(A) (1982 & Supp. 1992). "The factors required to be considered in a final determination of present injury must be reviewed in the threat of injury context to determine the imminence of actual injury." *Rhone Poulenc,* 592 F. Supp. at 1323. Accordingly, the Commission assesses the volume and consequent impact of imports,[2] as well as the condition of the affected domestic industry.[3] *See Report of the Commission* ("*Final Report*"), ITC Doc. 115, List 1, at 5; 19 U.S.C. § 1677(7)(C) (1982 & Supp. 1992).

Finally, the absence of any *indicia* of *present* injury is not considered conclusive that *threat* of injury does not exist. *Rhone Poulenc,* 592 F. Supp. at 1323–24 (*citing* H. Rep. No. 317, 96th Cong., 1st Session 47 (1979)). Moreover, the "threat with regard to one or two factors may so persuade the Commission of threat of injury that the absence of one or another will be no bar to a finding of the requisite threat." *Rhone Poulenc,* 592 F. Supp. at 1324; *See* 19 U.S.C. § 1677(7)(E)(ii) ("The presence or absence of any factor which the Commission is required to evaluate * * * shall not necessarily give decisive guidance with respect to the determination by the Commission * * *.")

In fact, section 1677(7)(E)(ii), entitled "Standard for determination," was included under the sub-section concerned with *material injury* and not under the sub-section regarding *threat of material injury* found in paragraph (F) of 19 U.S.C. § 1677(7) ("Basis for Determination"). This Court could hold that the liberal standard for determination of material injury does not apply to threat cases. The Court believes, however, that the general principle that the Commission need not come to an affirmative determination on each and every potential factor listed for consideration is equally sound in threat of injury cases. Nonetheless, the Court need not show that each Commission finding on each factor is not based on substantial evidence so long as the Court finds that the sum total of

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[2] 19 U.S.C. § 1677(7)(B).

[3] 19 U.S.C. § 1677(7)(C)(iii).

the Commission's findings do not rise to the level of substantial evidence of injury or threat of injury.

Analysis

The Final Report notes that "the statutory factors deal primarily with what is likely to occur with respect to imports. In order to determine whether that projection about future imports 'threatens' the domestic industry, it must be analyzed in the context of the condition of the industry." *Final Report,* List 1, at 16 n.46 (noting comments of Commissioner Rohr). The Court agrees. Unfortunately, the Commission did not assess the industry as a whole, and failed to take into account the perspective of industry leaders. Instead the Commission adopted the point of view of a sole company, Southwire, that alone stood to gain an increasingly firm grip on the domestic EC rod market as other U.S. producers scaled back.

The extraordinary circumstances of this petition merit more than the cursory mention they received in the Final report. Indeed, such an inquiry is indispensable if the condition of the domestic industry is to be accurately assessed—an assessment critical to an accurate determination of threat of injury, as the Commission majority itself pointed out.[4] As discussed *infra,* when the record is viewed as a whole, it does not substantially support the conclusion that the domestic industry is threatened by—or in the Commission's words is "vulnerable" to—Venezuelan imports of EC rod. *Final Report,* List 1, at 11. On the contrary, the "industry [is] dynamic, with a recent history of retrenchment as a result of economic conditions having nothing to do with imports." *Final Report,* List 1, at 35 (Views of Commissioner Brunsdale, Dissenting).

In assessing the condition of the domestic industry, it is helpful to begin with a description of the product.[5] Electrical conductor (EC) aluminum redraw rod, is a solid round product that is long in relation to cross section, and 0.375 inch or greater in diameter. EC rod is an intermediate product between primary aluminum and finished aluminum wire and cable. Aluminum wire and cable is used mainly to transmit electric current over long distances. Because aluminum wire and cable has significant advantages over the only other economically viable metal conductor of electricity (copper), there is at present no adequate substitute for the finished product.

The domestic EC rod manufacturers are predominantly vertically integrated producers. In addition to EC rod mills, they typically operate aluminum smelters and/or aluminum wire and cable production facilities, and a number of them also produce other aluminum products. The value added in the production of these other aluminum products tends to be higher than in the production of EC rod.

In the chain of production, hot raw aluminum is poured from the smelter to the rod mill for rolling before it has a chance to cool. The hot

[4] *See also Final Report,* List 1, at 35–36 (Views of Commissioner Brunsdale, Dissenting) (describing the procedure and purposes of the Commission's industry assessments).

[5] The court quotes freely from the uncontested factual material developed in the record below without attribution.

metal is water cooled and then squeezed through rollers to form the finished EC rod. Some manufacturers who are unable to obtain smelted hot aluminum are equipped to reheat cold aluminum to supply their EC rod mills. EC rod is then drawn to produce electrical cable or wire.

During the period of electrification of the United States, the demand for aluminum wire and cable and for the EC rod from which it is made was strong. The electrification process was substantially completed in the early 1980s. Since then, the demand for aluminum wire and cable has been limited to the replacement and repair of existing equipment and secondary uses such as housing and construction.[6] As early as 1981, U.S. aluminum companies began a systematic shift from the production of EC rod and aluminum wire and cable to production of other aluminum products.[7] Since then, and with greater frequency since 1984, EC rod mills and aluminum wire and cable production facilities have been idled or sold. During the 1984–87 period, the annual production capacity in the domestic EC rod industry declined from 519,842 short tons to 466,920 short tons, and total apparent domestic annual consumption decreased from 408,295 short tons to 346,842 short tons. The decline in capacity reflects the net of EC rod mill expansions and closures during this period, and the decline in apparent consumption reflects the decrease in demand for wire and cable.[8] Significantly, these statistics indicate that the decline in capacity began before the 1985 increase in Venezuelan imports of which petitioner complains.[9] The record does not contain substantial evidence that the Venezuelan imports have affected this trend. Accordingly, no material injury was found by the ITC for this period. Indeed, non-petitioning domestic companies have cooperated with the Venezuelans, selling off excess U.S. capacity to the Venezuelans as the domestic producers scaled back.

In regard to the condition of the U.S. industry, the ITC in its report found that production of aluminum rod declined from 363,275 tons in 1984 to 279,173 tons in 1986 and increased to 288,785 in 1987.[10] Moreover, the ITC noted that interim production in 1988 was also increasing, with the *caveat* that interim figures could be very misleading.[11] The ITC report finds that "performance is still substantially below 1984 levels * * *" and that consequently the domestic EC rod industry remains vulnerable to the threat of unfairly traded EC rod from Venezuela.[12] The ITC never properly explained why 1984 should be the benchmark of health in the industry throughout the period of investigation.

According to the record, the high level of production in 1984 was based on several misconceptions on the part of the industry, including the sup-

[6] *Staff Report*, List 1, at A–2–A–3, A–56–A–58.

[7] *See Staff Report*, List 1, at A–21, A–17 (table 2, n.2).

[8] *See Staff Report*, List 1, at A–26–A–28.

[9] *See also* ITC Rec., List 1, Doc. No. 114 at 63–64 (Statement of Mr. Fellers).

[10] ITC *Final Report*, List 1, at 7 (*citing Staff Report*, List 1, at A–46 (table 4).

[11] ITC *Final Report*, List 1, at 7, n.16 Nonetheless, when the interim figures *did not* contradict the ITC's findings, the Commission used then freely. *See e.g., Final Report*, List 1, at 7, 9–10, 14.

[12] *Id.* at 11.

positions that demand would increase and the cost of aluminum would continue to rise.[13] This in turn led to a market "crash" in 1985 and the EC rod producers began to respond more realistically to actual conditions in the industry thereafter. 1984 was not the absolute measure of health in this retracting industry but rather a cyclical high in a decade of long-term retraction of domestic producers from the Industry. When the Venezuelan imports are analyzed in view of the longer term economic trend through 1987, their impact, if any, is far less dramatic.

During 1983, as prices were strengthening, reflecting stronger demand, producers increased capacity utilization to meet the then current demand and the then current forecast of higher demand. The trend towards higher demand, however, did not continue. Producers continued making metal in spite of lower demand. Consequently, inventories rose and prices fell. For example, the Metals Week market price fell from the 80 cent range at the end of 1983 to the mid 40 cent range toward the end of 1984.[14]

At this point, the U.S. industry, faced with severe losses, accelerated rationalization.[15] Production was cut back drastically and capacity utilization was reduced on a world-wide basis.[16] Subsequently, excess inventories have been consumed and demand out-paced renewed production. Additionally, integrated companies have logically chosen to allocate scarce smelted hot aluminum to products with higher profit margins than EC rod; that entailed abandoning EC rod capacity. No single U.S. company, including petitioner, has contended that it has the ability or desire to satisfy U.S. demand today. The record shows that U.S. producers and purchasers turned to the next logical source of supply—the Venezuelans.[17]

The cause of the decline in production capacity is clearly linked to the decrease in demand for aluminum wire and cable. Historically, over two-thirds of EC rod production has been captive production for use in wire and cable facilities owned by the same company that operated the rod mill. Such intracompany shipments decreased by 27 percent volume units from 1984 through 1987, reflecting the contraction in demand for wire and cable in the United States and the discontinuance of wire and cable manufacturing by some of the EC rod manufacturers.[18] In sharp contrast, domestic shipments of EC rod to unrelated purchasers increased by 34 percent during the period.[19] These data indicate that the decline in production of EC rod is directly related to the decrease in demand for wire and cable. Despite the decrease in demand for wire and

[13] ITC Doc. 114, List 1, at 96–98.

[14] *Id.*

[15] Rationalization is an economic term of art that has been used in the context of this case to refer to the process of cutting back inefficient production and re-allocating limited supplies of raw materials to more profitable operations.

[16] ITC Doc. 114, List 1, at 96–98.

[17] *Id.* at 86–88 (Statement of Mr. Robertson, Corporate Contracting Agent, Aluminum, General Electric).

[18] *Final Report,* List 1, at 38–39 (Views of commissioner Brunsdale, Dissenting); *see Staff Report,* List 1, at 27–28.

[19] *Id.*

cable, the process of rationalization engaged in by the U.S. industry before the Venezuelan imports impacted upon the domestic market gave rise to a shortage of EC rod in the mid and late 1980s. Not only were the Venezuelans chosen as the most economical source of EC rod to make up for the shortfall, but the very company that now brings the petition in this case, Southwire, the sole petitioner, was responsible for facilitating and managing the majority of those initial Venezuelan imports.

The record shows the health of the rod industry since the initiation of the petition is in part due to the overall boom that the aluminum industry has been enjoying since 1986. Aluminum prices have increased from 55 cents in early 1987, to the $1.20 range by the termination of the investigation. Prices went up because rising demand caught up with the shrinking production capacity resulting from the industry's rationalization of capacity in the early and mid 1980s.[20]

The financial data relating to the EC rod industry show a decline in most financial indicators during 1985, followed by consistent upward movement thereafter.[21] Gross profits and operating income are difficult to assess because of the predominance of intracompany transfers in the data. Vastly different results are achieved depending on whether the integrated producers value primary aluminum and EC rod captive sales at cost,[22] or, in the alternative, whether they value primary aluminum and EC rod at market prices.[23] The financial data in this record, whether cost or market analysis is used, indicates that the EC rod industry has been consistently profitable.[24]

The record reflects that the divergence between the two accounting methods of computation is the result not of wide fluctuations in the market price for EC rod, but of the fact that "[t]he metal value [of primary aluminum] generally accounts for over 85 percent of the total selling price of the rod and therefore fluctuations in this value strongly influence the final price. During the period of investigation, there has been a wide swing in the metal value." *Staff Report,* List 1, at A–54. This economic reality undermines several of the conclusions that the Commission relied upon to bolster its affirmative finding of a threat of injury to the U.S. industry.

First, the ITA concluded that the Venezuelan rod was sold at LTFV based in part on low prices in five non-consecutive quarters out of nine quarters. The ITC used that data as evidence of price suppression in the

[20] *See* ITC Doc. 114, List 1, at 144.

[21] *See Staff Report,* List 1, at A 36.

[22] *Staff Report,* List 1, at A–37 (table 8).

[23] *Staff Report,* List 1, at A–39 (table 10).

[24] The Court notes, however, that "the financial information available to the Commission in these investigations is limited in value * * * because the industry consumes most of the domestically produced EC rod internally." *Final Report,* List 1, at 9. Commissioner Rohr, while siding with the majority, found that the financial data in this investigation was "extremely limited" in value and should be given little weight. *Id.* at 9 n. 23. Commissioner Brunsdale, while dissenting, agreed with the majority that the analysis based on market prices was more accurate. *Final Report,* List 1, at 40 (Views of Commissioner Brunsdale, Dissenting). However, whereas for the majority these figures merely indicated that the domestic industry was improving yet vulnerable, Commissioner Brunsdale found this data indicative of consistent profitability. *Id.* Under the market price analysis, the industry generated profits during the four years 1984 through 1987 of $8.9 million, $17.4 million, $20.5 million, and $24.6 million, respectively.

domestic market. ITC *Final Report,* List 1, at 15. In the other four quarters, the Venezuelan rod came in at a *higher* price, resulting in an average sale at less than fair value over the nine quarters of only 0.3 percent. The price comparison by quarter is inconclusive with this narrow differential. *See Tianjin Machinery Import & Export Corp. v. United States,* 16 CIT ____, ____, Slip Op. 92–14, at 13 (December 1, 1992) (underselling in 15 of 30 quarters is inconclusive).[25] These statistics are not substantial evidence of price suppression, one of the statutory factors the ITC was required to consider and in fact relied upon in making its determination. 19 U.S.C. § 1677(7)(F)(IV).

Second, the Commission's conclusion that the Venezuelan companies could easily obtain the needed primary aluminum on the world market is not supported by substantial evidence, or any evidence for that matter.[26] Commissioner Cass, in his *Additional Views,* found that "[s]upplies of primary aluminum are in short supply, as evidenced by the rapid increase in both spot and near-term futures prices of primary aluminum on world markets throughout the period within which Commerce determined unfair trade practices to exist." *Final Report* List 1, at 27, *citing Staff Report* at A–57.

Meanwhile, petitioners concede, indeed contend for the purposes of LTFV, that there is a very small profit margin in the sale of EC rod.[27] Therefore, all extraneous costs of production must be kept as low as possible if a company is to remain competitive. That is why most domestic producers are integrated. That way the aluminum travels the shortest possible distance from the smelter to the EC rod mill.[28]

Obtaining cold metal on the world market then reshipping the processed rod to the United States would presumably add another layer of freight costs to Venezuelan production. Despite Southwire's assertions that freight costs do not become a significant element of the fabrication adder unless the shipment is coast to coast, General Electric ("GE") reported that Southwire itself, because of freight cost considerations, was interested in selling EC rod only to GE's Fort Wayne plant. "In particular, Southwire has declined to supply GE's Shreveport facility and is un-

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[25] The Court further notes that the "parties state that various sources are used by the industry to set the metal price, and the prices from these sources differ from each other." *Staff Report,* List 2, at A–84. The market rate is constructed based on a survey. *Id.* In view of the fact that the metal price makes up the great majority of the price of EC rod, it is remarkable that prices averaged *within* 0.3 percent over the nine quarters studied.

[26] In fact, the ITC did not cite any authority or evidence for this proposition. *See Final Report,* List 1, at 14. The ITC has not shown that the Venezuelans have access to world supplies or that production from cold metal is feasible for them. The only evidence this Court could glean from the record on inspection was that at one time one U.S. company, Alcan, that did not have an attached smelter purchased rod on the world market. In fact, Alcan's Williamsport Pennsylvania plant purchased smelted aluminum from its Canadian parent. *Staff Report,* List 2, at A–6. Additionally, [ ] of Southwire's EC rod production is fed by cold metal. *See Id* at A–34. This evidence is insufficient as a matter of law to establish the viability or probability of Venezuelan purchases on the world market.

[27] *See* ITC Rec., List 1, Doc. 114 at 14. Petitioner contends that a 0.02 percent difference in bids will determine which company wins a contract.

[28] For example, it was because Kaiser closed its smelter at Chalmotte that its adjacent EC rod mill was closed. *See Post Conference Brief of Sural* at 47 n.39. Alcoa shut down its smelter at Vancouver, Washington in 1986 and subsequently found that rod production at associated facilities became uneconomical. *Id.* at 49. While several U.S. companies on record considered purchasing aluminum on the world market, all but two concluded that the costs were prohibitive or that it was more economical to buy the rolled EC rod from the Venezuelans. Note that none of these companies besides Southwire recorded their support for the petition.

willing to divert more than 20 percent of its GE commitment to North Carolina locations." *Brief of Amicus Curiae General Electric Company in Support of the Plaintiffs' Motion for Judgment Upon the Administrative Record* at 4–8.

Southwire's own conduct contradicts its contention that a difference of 0.02 percent in the price of cable (constructed principally from EC rod) is significant. *See Post Hearing Brief of Southwire* at 7, n.18. Such a narrow margin for contract awards would mean that freight costs are always significant.

Further evidence on the record indicates that the availability of raw aluminum on the world market was illusory. Smelters are presently operating at close to or in excess of 100 percent of their capacity worldwide.[29] Smelting of raw aluminum is necessary before the metal can be fashioned into EC rod. Whether the Venezuelan companies use hot or cold metal, they can only use as much as is smelted.

The Venezuelan companies contend that they do not have the luxury to ship primary aluminum half way around the world and the ITC has not offered any evidence that they have in the past. To the contrary, Sural has [ ] and has offered an explanation for why they would be extremely unlikely to do so imminently. *See Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record* at 49–51; *Staff Report,* List 2, at A–19; *id.*, ITC Doc. 29J, List 2, at 23 [ ]; *id.* at 29 [ ]; *Staff Report,* List 2, at A–19–A–20 [ ] The fact the Venezuelans have turned to increased smelting capacity to the complete exclusion of world market purchases is evidence that the world market purchases, if possible, were not economically feasible. In fact, six out of seven of the U.S. EC rod producers use molten aluminum from an adjacent smelter for their EC rod production, indicating it is the preferred method of production.[30]

As Sural justly points out, "the petitioner never even suggested that Venezuelan EC rod producers could practically obtain increased supplies of aluminum on the world market. It was never an issue. If Sural had any notice that the Commission would consider this issue it would have been able to address the issue and to show that the costs of purchasing aluminum on the world market and importing it into Venezuela are, indeed, prohibitive."[31]

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[29] ITC Doc. 114, List 1, at 144. The U.S. aluminum producers are currently reported to be operating at 104 percent capacity and cannot satisfy demand. *Id.* at 97.

[30] *See Staff Report*, List 2, at A–25 – A–36. A former Alcoa official explained that Alcoa dosed its antiquated rod rolling mill in Vancouver, Washington, in part because the mill could only use cold aluminum ingot, "in contrast to rod casting mills that use molten aluminum to produce rod and thereby eliminate the handling and preheating step." *See* Statement of Richardson, ITC Doc. 80, List 1, at 2. [ ] *See Staff Report*, List 2, at A–35 and n.3. Southwire closed its Carrolton, Georgia plant. There was no adjoining smelter to the Georgia facility; it had to use cold metal to produce rod. *GE's Post Hearing Brief* at 17, ITC Doc. 15, List 2.

[31] *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record* at 51, n.122. The Staff Report itself notes that "[l]ocating the rod mill near the smelter eliminates the transportation and inventory costs associated with supplying a rod mill with aluminum ingot shipments (cold metal)." *Staff Report*, List 2, at A–5. The report further notes that "[t]he importance of these cost savings can be attributed to the low value added in aluminum rod production – 10 percent or less of its total cost – and the significant proportion of its cost attributable to primary aluminum." *Id.*, n.1.

This Court has repeatedly held that a party may not reverse the position it took before the agency and raise contrary arguments on appeal, explaining that "to allow plaintiffs to change their position at this time would deny the Commission the opportunity to review plaintiffs' arguments during the time period prescribed by statute as well as deprive the other parties of their right to respond to plaintiffs' position." *Calabrian Corp., v. ITC,* 16 CIT ___, ___, Slip Op. 92–69 at 11 (May 13, 1992) ___ F. Supp. ___, *citing Trent Tube Div., Crucible Materials Corp. v. United States,* 14 CIT ___, ___, 741 F. Supp. 921, 929 (1990).

The same standard applies to the Commission when it raises arguments for the first time in its final reports. Such a position is especially justified in this case where the record is thin with regard to the Commission's finding and the Commission did not permit rebuttal on the issue.

The Court notes that the Commission has compounded the difficulty of the Court's task in resolving the issue of aluminum supplies by not citing to anywhere in the record to support the Commission's finding regarding world market supplies in the Final Report; nor has the Commission even raised the issue before the Final Report. Likewise, the Staff neglected to address the world supplies of aluminum and instead focused on smelting capacity. For example, a Staff memorandum[32] rebutted the Venezuelan complaints that supplies of aluminum were difficult to obtain not with the suggestion that the Venezuelans could purchase it on the world market, but that the Venezuelans would soon be increasing their smelting capacity.[33]

There is evidence from a variety of sources on the record indicating a severe worldwide shortage of aluminum.[34] Considered with evidence on the record that smelters are working at maximum capacity, this evidence suggests that whatever aluminum (cold metal) is available on world market is quite costly. The added costs of ocean transportation and reheating the aluminum for processing raise further doubts about the viability of obtaining metal on the world market for the Venezuelan. Moreover, even if all these obstacles could be overcome, nothing in the record supports the inference that this world market aluminum would be directed to EC rod production rather than mechanical rod or other higher value-added products.

Logically, scarce raw aluminum, when it does become available, will be directed to the most profitable products with the higher value added; the U.S. experience, based on the record, reflects this. The ITC Staff Report notes the same trend for the Venezuelan companies: They are shifting their aluminum resources to higher value-added aluminum products.[35] In addition, much of the planned capacity is to be used for

[32] Staff Memorandum on "Pre-hearing Discussion of Elasticities for Certain Electrical Conductor Aluminum Redrew Rod from Venezuela, Investigations Nos. 701–TA–287 (Final) and 731–TA–378 (Final)," June 21,1988.

[33] *Post Conference Brief of Sural and Answers to Commission Inquiries* ITC Doc. 16, List 2, at 48.

[34] *See, e.g.,* ITC Doc. 114, List 1, at 88–89, 96–98, 11, 119–20, 127, 141–144, 146–47.

[35] *Staff Report,* List 2, at A–13.

production of mechanical rod.[36] Given their problems purchasing aluminum at home,[37] if purchasing from foreign sources were a viable option, the Venezuelan producers would likely have done so already.

The Court finds that there is no substantial evidence in the record that world market supplies of primary aluminum are likely to play a role in feeding the Venezuelans' increased capacity. Without more primary aluminum, the Venezuelans' present increased capacity cannot be utilized and therefore does not rise to the level of a "real and imminent" threat of injury to the domestic injury. The ITC did not address the unrebutted evidence on the record of the severe world shortage of aluminum and the U.S. shortage of EC rod. Until this shortage is remedied, a possible increase in Venezuelan imports will serve merely to fill excess demand, not cause injury to the U.S. industry. In other words, U.S. purchasers of EC rod will have to buy EC rod from a source other than the domestic suppliers to satisfy domestic shortages. So far these purchasers, many of them members of the EC rod industry itself, have chosen to buy from Venezuela.

On remand, the ITC is instructed to explain what evidence, if any, in the record supports its contention that world market supplies of aluminum are readily and imminently available to the Venezuelan producers. The ITC is invited further to explain why, if these supplies have been available and economically feasible, the Venezuelans have never taken advantage of them – even throughout the period of investigation, when the Venezuelans had significant excess capacity and no material injury was found. Because the ITC raised the question of world supplies of aluminum in a conclusory manner, plaintiffs shall be permitted a rebuttal on remand.

In addition to an overview of the domestic industry as a whole, the Court feels compelled, by the peculiar circumstances of this case, to scrutinize the situation of Southwire, the sole petitioner. The Court notes that Southwire, with just [ ] of the U.S. market,[38] is the *only* U.S. company that appears concerned with potential injury to the U.S. industry – even though a mere check mark on a Commission questionnaire was all that was required of the other U.S. companies to express such concern. Moreover, as the record indicates, Southwire has been operating at peak capacity'[39] with no planned expansion[40] and has been enjoying record profits unparalleled in its 37 year history.[41] These indications of the remarkable health of Southwire are unrebutted anywhere in the record. Yet, the very companies "on whose behalf" Southwire brings this suit are not before the Court and did not support

[36] *Id.*

[37] *Staff Report,* List 1, at A–19.

[38] *Staff Report,* List 2, at A–24, table 2.

[39] ITC Doc. 114, List 1, A–78 (Statement of Mr. Long, Southwire Assistant Vice President, Manufacturing).

[40] *Id.* at 78–79; *see also Final Report* at 31 (Add'l Views of Commissioner Cass) ("the domestic EC rod industry conspicuously is not now expanding, and apparently lacks any current plans to expand.")

[41] *Post Hearing Brief of Sural* at 1 (*citing* Southwire February 1, 1988 Press Release).

Southwire's petition. Meanwhile, Southwire's counsel took pains to convince the Commissioners at the hearing that it had brought this case not on its own behalf, but rather "on behalf of the domestic industry." ITC Doc. 114, List 1, at 56.

Southwire contends that the industry's reluctance is due to pending business transactions involving the other domestic manufacturers, the international ramifications of which might make domestic producers leery to support the petition. This response, however, supports Commissioner Brunsdale's finding that the domestic industry is engaged in a "dynamic retrenchment that predates and has little to do with the Venezuelan imports at issue."[42] Indeed, if the industry truly perceived a threat of injury from the Venezuelan imports and was inclined to continue EC rod production on an increased scale, it would presumably indicate its support for Southwire's petition.

The record indicates that Southwire's explanation is not the correct one. As the Court noted above, domestic companies began selling off capacity in the early 1980s, long before the Venezuelans arrived in the U.S. market.[43] It is also noteworthy that when Venezuelan rod appeared on the U.S. market, the party directly controlling the Venezuelan imports was Southwire. Other plants purchased by the Venezuelans from American companies were already being supplied by the Venezuelans or Alcoa (who has also opposed this petition) before the purchases took place.[44]

The Commission accepted that Southwire's sole petition was "on behalf of" and therefore to the benefit of the U.S. industry as whole. The only evidence in the record, however, indicates that this petition is clearly against the interests of the other companies. General Electric ("GE"), a large purchaser of EC rod, has done its own industry survey. The GE testimony provides a valuable insight into how the EC rod industry is actually operating.

Unlike Southwire's version, which is supported by no other party, GE's position is buttressed by the opposition of Alcoa, The Aluminum Trade Council, and the Aluminum Brick and Glass Workers Union. The Department of Commerce refused to consider the position of interested parties not formally part of the EC rod industry for the purposes of standing. Without reaching this issue for the purposes of standing, this Court holds that the stance of agencies and institutions intimately linked to the industry under investigation—such as the Aluminum Trade Council—is relevant to the support for the petition, or lack thereof, as evidence of threat of injury.

GE testified to the Commission that although Southwire was a quality producer, it was unable, and in some cases unwilling, to provide for

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[42] *Final Report,* List 1, at 41 (Views of Commissioner Brunsdale, Dissenting).

[43] GE contends that the present shortage of aluminum is due in part to low supplies world wide. Plant closings at Kaiser (Chalmotte, Louisiana), Essex, and Capital Wire all contributed to the shortage but none were occasioned by imports of Venezuelan rod. ITC Doc. 114, List 1, at 88. For example, the Kaiser facilities were closed in late 1982 and early 1983, before the Venezuelan rod appeared on the market.

[44] *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record* at 57.

all of GE's needs.[45] Because GE's purchasing decisions are made on the basis of reliability of supply, pricing, and quality, GE was forced to look elsewhere to ensure adequate supplies for all its production facilities—especially since, in keeping with the industry trend, it had been scaling back production of EC rod since the late 1970s and early 1980s.[46]

Southwire shut down its production facility at Carrolton, Georgia in 1986, in the face of near capacity utilization at its other plants and industry demand in excess of its supply in the mid and late 1980s.[47] Furthermore, as of the time of this petition, Southwire had no plans to expand its capacity by acquiring or purchasing new mills.[48] This additional evidence of industry retraction and inertia explains the industry's reluctance to back the Southwire petition, and the Venezuelan move to increase U.S. sales.

Contrary to Southwire's contention that a narrow margin (0.02 percent) can make or break a contract bid, GE asserts that pricing is not determinative.[49] For example, in 1988, GE paid Southwire 3.4 cents per pound extra to supply rod to Rome, New York rather than developing one of three potential alternate sources. Furthermore, GE paid its major supplier that year a slightly higher rod adder[50] than it paid to its other two suppliers to assure timely delivery as required throughout its total plant system—in other words for "flexibility and dependability of supply."[51]

Mr. Robertson, GE's contracting agent, stated that the Venezuelan companies have not been undercutting or suppressing U.S. prices as far as GE was concerned.[52] Rather, he was gravely concerned that Southwire would be unable or unwilling to supply GE's needs in the future.

GE began developing its supply relationships with Sural in 1983 and Iconel in 1984.[53] GE ran preliminary production trials in 1984 and attempted to scale up its purchases in 1985 with limited success.[54] In 1985, GE purchased 24 percent of its rod from Venezuela and paid a 1.4 percent premium *over* its U.S. producers who supplied the balance of its requirements. In 1986 and 1987, Sural quoted broad adders which were 38 percent higher than those of the U.S. producers and were consequently not awarded any GE business. This evidence further counters

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[45] ITC Doc. 114, List 1, at 82–90 (Testimony of Mr. Robertson). For example, Mr. Robertson reports that in the past, Southwire has expressed an intention to limit its supply to GE's Fort Wayne plant to 20 percent of GE's request.

[46] *Id.* at 85–90.

[47] *Id.* at 78–79.

[48] *See* note 42, *supra.*

[49] In Southwire's *September 1987 Registration Statement* filed with the SEC, Southwire maintained that price, availability, quality, and reliability played a role in its purchasing decisions. It is hardly credible that a 0.02 percent change in the price is more important than the potential weight of the other factors. *Southwire Registration Statement* on Form S–1, File No. 33–17537. The Staff Report, for example, noted that "freight allowances of 1 to 1.5 cents per pound are given to any company willing to pick up the rod with their own trucks." *Staff Report,* List 2, at A–83.

[50] The rod adder fee is the production charge over the charge for the underlying primary aluminum.

[51] Testimony of Mr. Robertson, ITC Rec., List 1, Doc. 114 at 85.

[52] *Id.*

[53] *Id.* at 86.

[54] *Id.*

whatever other scant evidence of price undercutting or suppression of U.S. prices that exists in the record.

Meanwhile, in 1988, Southwire insisted on switching GE to a higher priced metal base (that of U.S. Metals Week transaction price). That condition was not imposed upon GE by any other supplier, domestic or foreign. GE's contracting agent estimated that Southwire's decision resulted in a 2.4 cent per pound difference in the adder over the first five months of 1988.[55] In addition, Southwire wanted to raise the rod fabrication adder by 58 percent. The combined effect of these two proposed increases would have been to raise Southwire's price to GE by 100 percent over its 1987 price. Consequently, Southwire "priced itself" out of its 1987 position as 45 percent supplier to GE, to settle at 5 percent.[56] The industry reluctance to support Southwire's petition in the instant matter is more understandable in view of this evidence.

During the period from 1986 to 1988, GE reports that it bought "an estimated 75 million pounds of rod, over half of which has come from its main U.S. supplier over that time, over a third of which has come from Southwire, approximately 8 percent from a third U.S. supplier and only 4 percent from Venezuela," not enough to support a finding of a material threat of injury to Southwire or other U.S. industry members.[57]

SUPPORT AS EVIDENCE OF THREAT

Southwire, which represents approximately [ ] of the domestic EC rod industry, is the sole petitioner from that industry in this case. The failure of all other members of the industry to support the petition is strong factual evidence that the EC rod imports are not causing a real and imminent threat of injury to the domestic industry.

ITC commissioners have distinguished in the past between industry support for standing and industry support as evidence of injury: "Wholly apart from the issue of standing to maintain a petition * * *, the Commission may conclude under Sections 705(b) and 735(b) that relief is not appropriate where the petition lacks sufficient industry support. There seems to be little dispute about our ability to do so either as a matter of statutory intent or because *lack of industry support is persuasive evidence of the lack of a causal connection between unfair imports and material injury to the domestic industry.*" *Certain all-Terrain Vehicles from Japan,* No. 731-TA-388 (Preliminary), USITC Pub. 2071 (March 1988), Additional Views of Chairman Liebeler and Vice Chairman Brunsdale at 37 (footnote omitted) (emphasis added).

The notion that industry support for standing is a separate question from support as evidence of injury or threat of injury is consistent with the position taken by the Court of Appeals for the Federal Circuit. *See Suramerica v. United States,* 966 F.2d 660, 665 n.6 (Fed. Cir. 1992). The Court of Appeals for the Federal Circuit has held that the ITC may defer

[55] In May alone, the difference was 4 cents. *Id.* at 87.

[56] *Id.*

[57] *Id* at 88.

to Commerce's initial determination of support for purposes of pursuing an investigation. *See Id.* The ITC's primary role as delineated by the statute is to determine whether or not there is injury or threat of injury. 19 U.S.C. § 1673 *et seq. See discussion of standard of review, supra.* Therefore, whereas Commerce now determines standing, countervailable subsidies, and sales at less than fair value, the only role left to the ITC is to gather relevant data in the record regarding injury or the threat of injury.

In an opinion relying on *Suramerica v. United States,* 966 F.2d 660 (Fed. Cir. 1992), this Court has also distinguished between support as evidence and support for the purposes of standing. *See Minebea Co., Ltd. v. United States,* 16 CIT ____, ____, 794 F. Supp. 1161, 1164–65 (1992) (upholding Commission finding of material injury where majority of domestic spherical plain bearings industry opposed petition), *aff'd Minebea Co., Ltd. v. United States,* Slip Op. 92–5, CAFC Docket No. 92–1289, January 26,1993; *see Suramerica,* at 665 n.6

The *Minebea* Court echoed the Court of Appeals for the Federal Circuit by offering that "questions of the standing of a petitioner to file an antidumping duty petition are to be decided by the ITA alone" in the section of the opinion entitled "Standing." *Minebea Co., Ltd. v. United States,* 16 CIT ____, ____, 794 F. Supp. 1161, 1164 (1992). In a separate section of its opinion entitled "ITC's Injury Determination," the *Minebea* Court rejected the argument of Minebea that there could be no finding of material injury if a majority of the U.S. industry believes that its problems are not caused by LTFV imports. Although the Court noted that Minebea did not challenge the ITC's determination on the basis that it was not supported by substantial evidence, the Court went on to state in *dictum* that, "when the ITC is determining whether LTFV imports are a cause of material injury suffered by a U.S. industry, the position of any segment of the U.S. industry as to the cause of its difficulties is not something which the ITC is required to consider." *Minebea,* 16 CIT ____, ____, 794 F. Supp. 1161,1165 (1992), *citing* 19 U.S.C. § 1677(7) (1992).

The Court declines to follow the *dictum* in *Minebea,* and holds that the ITC must consider the position of the domestic industry. While no statute requires a negative finding given the opposition of a majority of the domestic industry, 19 U.S.C. § 1516a(b)(1)(B) requires that an ITC determination be supported by substantial evidence on the whole record. Absent compelling evidence of threat, it is not reasonable to conclude that the domestic industry is threatened when a majority opposes or does not support that finding.

There may be circumstances warranting a finding of injury, even where the majority either does not support or actively opposes the initiating petition, if the independent data clearly support a finding of threat of injury. In that instance the administrative agency would be taking remedial action on behalf of a company or companies instead of the industry. That is, the Commission, by pursuing enforcement, places its

judgment above that of the industry – which either opposed the petition or declined to support it – regarding the effect of allegedly unfairly traded imports.

The decision in *Minebea* concerned *material injury* and was made in light of the fact that Minebea did not challenge the ITC's determination on the basis that it was not supported by substantial evidence. In contrast, *Suramerica* concerns *threat of material injury,* 19 U.S.C. § 1677(7)(F) (1982 & Supp. 1992), and the heart of the issue is whether the ITC's determination was based on substantial evidence. The industry's position is highly relevant to whether an industry has been injured by imports, and even more relevant to the question of whether an industry that has not been so injured is nevertheless threatened with material injury.

This Court has addressed the scope of the inquiry into the condition of the industry for the purposes of material injury. *See Calabrian Corp.,* ____ CIT ____, ____, No. 92–69, Slip Op. at 17 (May 13,1992). The statute directs the Commission to determine "whether there is a reasonable indication that an industry in the United States is materially injured." 19 U.S.C. § 1671b(a)(1)(A) (1982 & Supp. 1992); *Calabrian Corp.,* ____ CIT ____, ____, No. 92–69, Slip Op. at 17 (May 13, 1992). "Industry" is defined as "the domestic producers *as a whole* of a like product." 19 U.S.C. § 1677(4)(A) (1992) (emphasis added); *Calabrian Corp.,* ____ CIT ____, ____, No. 92–69, Slip Op. at 18. "That Congress intended for the Commission to consider the entire industry is clear from the legislative history of the 1979 Act. Congress endorsed the Commission's practice prior to the passage of the 1979 Act, in which 'the phrase 'an industry in the United States' * * * has been interpreted by the ITC as referring to all the domestic producer facilities engaged in the production of' the like product." *Id.,* at 18, *citing* S. Rep. No. 249, at 82, 96th Cong., 1st Sess. § 252 (1979); *see Copperweld Corp. v. United States,* 12 CIT 148, 165–66, 682 F. Supp. at 569 (1988). There is no reason why this analysis should not apply to inquiry in threat of injury cases. In *Suramerica,* the ITC conducted an inquiry based on allegations of *material injury* and of *threat of material injury.*

Further, section 1677(7)(A) implicitly requires that the ITC consider the position of the domestic industry. Section 1677(7)(C)(iii), entitled "Impact on affected domestic industry" under the subheading "Evaluation of relevant factors" lists a host of factors including *potential decline in output,* and *potential negative effects on the existing development and production efforts of the domestic industry.* These factors do not exist in a vacuum. They must be considered in light of the industry's perceptions, which inform these indicators and the trends likely to materialize. Section 1677(7)(C)(iii) further states that "the Commission shall evaluate all relevant economic factors." To hold that the consideration of information necessary or relevant to the evaluation of the relevant factors enumerated under section 1677(7)(c) is not required would eviscerate that statutory provision.

In the legislative history to the Trade and Tariff Act of 1984, the Conference Committee acknowledged that "the projection of future events is necessarily more difficult than the evaluation of current data. Accordingly, a determination of threat will require a careful assessment of identifiable current trends and competitive conditions in the marketplace." H.R. Rep. No. 1156, 98th Cong., 2d Sess. at 174 (1984). The position of individual member companies, when the industry is comprised only of large companies which are few in number, is critical to this assessment since domestic industry perception of foreign competition influences current trends.

Moreover, section 1673 contains the fundamental requirement that a causal nexus be established between the allegedly unfairly traded imports and the injury, *i.e.*, that the injury be "by reason of" those imports. 19 U.S.C. § 1673 (1982). The position of the industry at issue, which is the single group with the largest stake in the outcome of the proceeding, is always relevant to determining this causal relationship. Again, in some cases, once the Commission considers relevant lack of industry support, it may still be justified in finding injury. A finding of a threat of injury would be rare because majority opposition or minority support for a industry member petition alleging threat is strong evidence that the threat is not real, imminent, or likely.

The ITC is required to consider the whole record and whatever in the record fairly detracts from its finding. *See discussion, supra, re Universal Camera Corp.* This Court in *USX Corp. v. United States,* 11 CIT 82, 95, 655 F. Supp. 487, 498 (1987) has stated that "[a]lthough ITC is not required to amass every conceivable shred of relevant data in order to comply with the requirements of the law, the absence of information necessary for a thorough analysis may render a determination unsupported by substantial evidence." Likewise, although the Commission need not establish that it considered every shred of evidence to comply with the requirements of the law, its failure to consider relevant information may render a determination unsupported by substantial evidence.

"Absent some showing to the contrary, the Commission is presumed to have considered all evidence in the record." *Rhone Poulenc, S.A. v. United States,* 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984). Moreover, the Commission "may, and indeed must, consider all evidence presented which comprises the record," even if it is not contained in the staff report. *Wells Mfg. Co. v. U.S.,* 11 CIT 911, 921, 677 F. Supp. 1239, 1247 (1987). The industry's views in *Suramerica* are not only in the record, they are prominently known to the ITC; therefore, they must be considered.

In conclusion, whereas the position of "any segment" of the U.S. industry may not be specifically itemized in section 1677(7), the implication of the statute, administrative procedure, and the prior holdings of this Court compel the conclusion that the industry support for a petition is relevant and must be considered. In *Suramerica,* the minority sup-

port for the petition, and the opposition to it, is relevant to the likelihood of the threat of injury.

On remand, the ITC must consider the industry's position regarding the petition and explain how a finding of threat of injury can be supported despite the decision of the majority of the industry not to support the petition and the lack of concern for a threat of injury as reflected in the ITC questionnaire responses. *See* discussion of responses to ITC questionnaires, *infra.*

As a procedural and evidentiary matter, the absence of industry support for a petition is problematic in a Commission proceeding. Respondents are in effect not allowed to face the "industry" that accuses them. First, the Commission is prevented from fully evaluating the impact of imports on the domestic industry because the industry does not appear at the hearing to support the petition. The Commissioners, therefore, do not have the opportunity to ask important questions. Similarly, the petitioners, as here, can advantageously defer question to an industry that is not present to answer. More importantly, respondents are denied the opportunity to review and question relevant data on the entire industry. Pursuant to the Commission's regulations, 19 C.F.R. § 207.7(a), respondents are not permitted to review data provided by those industry members that do not affirmatively support the petition. As a result, the respondents are precluded from presenting a fully informed case.

These concerns are especially warranted in this case. The ITC Staff Report is dotted with second-hand accounts and inferences that various of the other companies did indeed support the petition. *See Staff Report,* List 2, at A–29 & n.1. For the purposes of support as evidence of injury, the ITC may not infer that industry members support a petition privately, via the Staff to the Commission, and outside the administrative and judicial process, where those companies have declined to indicate their support for a petition on the ITC questionnaire. This Court considers all such references to industry support for the petition, with the exception of Southwire's, improper and inoperative, and must be excluded from consideration upon remand.

Southwire is operating at peak capacity and enjoying record profits. A review of the record, demonstrates time and again how Southwire, as the sole petitioner, is placed in the awkward position of defending as injured the other members of the industry where they have not seen fit to defend themselves. It is anomalous in the extreme that the other companies would not to come forward when, as Southwire asserts, their very existence is at stake. If any other company truly felt real and imminent threat to their position from the Venezuelan imports, surely they would come forward. To ignore a real and imminent threat is to act at one's peril and flies in the face of logic. The total lack of industry support apart from Southwire's in this case seriously undermines the contention that the industry is in fact threatened.[58]

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[58] The Staff Report's remarks that the other members of the industry were more concerned about [ ] than they were of Venezuelan imports constitute idle talk that was understandably not addressed by the Commission in its Final Report.

It is plain from the facts of this case that Southwire has brought this petition not to protect its own operations from injury, which are operating at full capacity, but to erect barriers to potential competitors as established companies leave the industry. "The Company believes it may be able to increase its market share in its core business through internal growth and acquisitions. *Demand for most of the Company's rod wire and cable products currently exceeds the Company's production capacity.* Due to recently announced decisions that certain competitors of the Company are leaving the wire and cable business, or are for sale, management of the Company believes that it may be able to realize increases in market share."[59]

In the domestic EC rod industry, it is known with absolute certainty who the member companies are. Because these companies were all sizable, the ITC had a duty to question them and in fact did so. There were seven large U.S. companies producing EC rod domestically during the period of investigation and they were all solicited.[60] Indeed, [ ] – five of the six other producers of EC rod – stated that they had not experienced any negative effects on growth, investment or ability to raise capital as a result of imports of Venezuelan rod.[61] The sixth stated that it had experienced such negative effects only with respect to its wire and cable operations, and not with respect to EC rod.[62] Four of the six other producers informed the ITC that they did not anticipate any negative impact from imports of EC rod from Venezuela.[63] A fifth noted that it anticipated such a negative impact only with respect to its wire and cable operations.[64]

The Commission could find no present material injury based on these scant and admittedly unreliable data; nevertheless, the Commission majority was able to find a *threat* of material injury to the U.S. industry given these circumstances.[65] The fact that not one other member of this industry comprised of a few large powerful companies came out in support of the Southwire petition is compelling factual evidence that the industry itself is not threatened with material injury by imports of Venezuelan EC rod. The additional opposition to the Southwire petition of Alcoa, the Aluminum Trade Council, and the principle union related to the industry buttresses evidence in the administrative record that there is no substantial evidence of a threat to the domestic industry of material injury.

Significantly, Southwire itself did not view the threat of Venezuelan imports seriously enough to mention them on Southwire's September

[59] ITC Doc. 114, List 1, at 210 (Statement of Mr. Briger, quoting from "page 22 of September 29th prospectus" of Southwire) (emphasis added).

[60] *See supra* at 2.

[61] *See* Responses to Q.IV.G.1 of the Producers' Questionnaire, ITC Doc. Nos. [ ] List 2.

[62] ITC Doc. [ ] at Q.IV.G.1. [ ] List 2.

[63] *See* ITC Doc. Nos. [ ] Responses to Q.IV.G.2, List 2.

[64] *See* ITC Doc. [ ] Response to Q.IV.G.2 [ ] List 2.

[65] Indeed, Commissioner Cass noted this was a "very close call" on the threat issue. *Final Report,* List 1, at 19.

29, 1987 registration statement filed with the SEC which was filed *after* the petition.[66] The absence of any mention of a threat from the Venezuelan. imports stands in stark contrast to Southwire's depiction of the industry in its petition.[67]

The record informs the Court that "as a matter of SEC law and practice, facts concerning the effects of competition must be disclosed if those effects either had had, were having, or *could reasonably be expected to have* a material adverse impact on the business of the issuer in the future. SEC regulations specifically require disclosure of competitive conditions in the industry in which the issuer operates, including, where appropriate, an identification of specific competitors."[68]

In the prospectus, Southwire describes itself as one of the largest manufacturers in the United States of copper and aluminum wire and cable for the transmission of electricity. Its strategy is to increase its position as a leader in the core businesses of rod and wire and cable.[69] Although domestic competitors are identified by name, there is no mention of the effect of foreign competition.[70]

Sural further contends that the SEC requires companies like Southwire, who had not previously had a market for their shares, to summarize anything that might affect business or investment potential in one prominent place at the beginning of the prospectus. Southwire complied with this requirement by listing six special risk factors ranging from the volatility of aluminum prices to its own contingent liabilities. Foreign competition was not mentioned.[71]

Sural concludes that "as a matter of SEC law and practice, the allegations made by Southwire about the competitive effects of Venezuelan's EC rod imports are material facts required to be disclosed in a registration statement, if true. No such disclosures were made. The Petitions [*sic*] and the registration statement simply cannot be reconciled."[72]

Southwire's only rebuttal is a brief letter from its attorneys attesting knowledge of the petition and dismissing Sural's contentions regarding the SEC registration statement as unnecessary.[73] Southwire's attorneys indicate they were convinced that the Venezuelan imports posed a material threat to Southwire yet at the same time contended that disclosure was unnecessary. Southwire's position is inherently inconsistent,

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[66] ITC Doc. 114, List 1, at 135 (Statement of Mr. Michael Dooley in reference to Southwire Registration Statement, or "Southwire Prospectus" on Form S–1, File No. 33–17537). Although the offering was set for October 19th of that year, the due diligence procedures were performed *prior* to the registration filing in September. The petition was filed in June. *Id.* at 139. The fact that the offering was subsequently withdrawn for other reasons makes Southwire's omission no less significant.

[67] For examples of Southwire's pessimistic assessments see ITC Doc. 80, List 1, Statement of Dooley at 8–12 (*citing* Antidumping Petition of Southwire).

[68] ITC Doc. 114, List 1, at 135; *see* ITC Doc. 80, List 1, Statement of Professor Dooley at 3 (quoting from Form S–1 and Regulation S–K and from Southwire Prospectus); *see* 17 C.F.R. § 229.101(c)(x) (1987).

[69] *Id.; see Southwire Prospectus* at 3, 6.

[70] *Id.; see Southwire Prospectus* at 25.

[71] *See* ITC Doc. 114, List 1, at 13–37; Statement of Dooley at 13 (quoting from Southwire Registration Statement at 7–8), ITC Doc. 80, List 1.

[72] ITC Doc. 114, List 1, at 138.

[73] ITC Doc. 14, List 2 (Exhibit "c").

and does not constitute a rational explanation for its failure to mention Venezuelan imports or foreign competition, and their threat to the industry, in its registration statement.

Southwire would have it both ways: Sural is not a threat for the purposes of selling securities, but is a threat to an unconcerned industry for purposes of this litigation. Southwire cannot have it both ways. In addition to the lack of industry support, the Court finds in Southwire's 1987 SEC registration statement compelling evidence—provided in the record by petitioner's own document—that the U.S. industry is not threatened by reason of Venezuelan imports of EC rod. On remand, the ITC is ordered to explain how the ITC questionnaires to U.S. companies in the EC rod industry and Southwire's own registration statement can be reconciled with respect to the condition of the industry and the U.S. companies' views, as reflected in the ITC questionnaires, concerning the degree of threat posed by Venezuelan imports.

BACKGROUND TO THE SOUTHWIRE—SURAL DISPUTE

Given the peculiar circumstances of this case, the Court finds the facts that underlie the Southwire—Sural relationship both significant and enlightening. Southwire actually founded Sural in 1975, as a joint venture with a Venezuelan firm.[74] It built Sural's plant, selected its management, and controlled its operations and sales through March of 1985.[75] Southwire also introduced Sural products into the U.S. market. Through 1985, Southwire purchased large amounts of Sural's EC rod for its own U.S. operations. In 1984, for example, [ ] of Sural's U.S. sales went to Southwire.[76]

When Southwire was questioned by the Commission whether voluntarily or by agreement it had advised Sural on certain sales and offers in the United States, Southwire responded that those services are expected in such agency arrangements.[77] The Southwire representative sidestepped the gist of the Commissioner's question by stating that "there was really only one way of getting into this market * * * so whether we advised them to cut the price to get in, I don't think is relevant."[78]

This Court disagrees with Southwire's disingenuous assessment of the relevancy of whether it counseled Sural to sell to the United States market at LTFV. To the contrary, the Court finds it highly relevant, and highly irregular, that the sole company to bring the instant petition claiming sales at LTFV in 1987, appears to have been counseling Sural to do just that through 1985. Ironically, the record indicates that Southwire itself set Sural's prices in two of the four years that Southwire com-

[74] *See Staff Report,* List 2, at A–18, A–35.

[75] *Id.* at A–36. *See also Respondent's Post Hearing Brief* at 7. Southwire responds that as a world leader in continuous casting and rolling technology, it is not atypical that it sells equipment to its competitors. ITC Doc. 114, List 1, at 42–43. In light of Southwire's past relationships with Sural, the latter could hardly be labeled a competitor for the purposes of that remark.

[76] *See Pre-conference Brief of Sural,* ITC Rec., List 2, at 10 & Confidential Exhibit P.

[77] ITC Doc. 114, List 1, at 23–24.

[78] *Id.* at 24.

plains of for unfair pricing (1984 and 1985).[79] Remarkably, the Commission was asked by Southwire to punish Sural for acts that Southwire itself voluntarily committed and from which Southwire itself benefitted.

In addition to these business relationships, Southwire's affiliate, Southwire Metals International, was also the exclusive sales agent for Sural's sales of EC rod in the U.S. through March 1985, and it effectively set Sural's prices in the U.S. market, as a result of its 49 percent equity interest in Sural, its management of Sural, and the effective control over Sural's prices exercised by the Southwire General Manager assigned to the Sural project.[80] In 1985, following a disagreement over the repayment of loans and the effect of exchange rates *inter alia* Southwire sold its interest in Sural.[81]

Imports from Venezuela made a modest entry into the United States in 1984 and 1985, in part because it served Southwire's interests and in part because the Venezuelans perceived market opportunities in the United States. The Venezuelan imports were also welcomed by other members of the EC rod industry and the aluminum industry—two industries that are difficult to separate given the predominance of vertical integration.

It has been established in the record that there is a severe shortage of EC rod in the U.S. market at present and that the U.S. producers cannot and will not be able to satisfy demand in the near future. Purchasers of EC rod have found that the Venezuelan imports are the most logical and economical alternative to make up for the shortfall.

Moreover, purchasers have demonstrated the unreliability of U.S. producers and their inability to provide sufficient quantities of the EC rod crucial for the functioning of the U.S. wire and cable mills. As the rest of the U.S. industry reduces EC rod production, Southwire is poised to reap substantial benefits if it can exclude foreign competitors from satisfying severe shortages of EC rod in the United States. The evidence in the record strongly suggests that Southwire has used the petition process to favor its needs and goals over those of the rest of domestic industry.

Additional Factors Concerning Threat of Injury

The Court now turns its attention to other factors considered by the ITC, including the following: expansion of Venezuelan EC rod capacity, U.S. inventories of Venezuelan rod, import trends, and the relevancy of European Community trade policy and the potential for diversion of

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[79] ITC Doc. 114, List 1, at 125; *see also Post Hearing Brief of GE* at 2–4. Although Southwire and Sural terminated their relationship in March 1985, most contracts in the field are long term and were thus negotiated near the end of 1984 and early 1985 for the entire year of 1985. Thus South Wire played a central role in setting Sural's prices throughout 1985.

[80] *See Staff Report,* List 2, at A–36; Butler Aff., para. 8, *Sural's Responses to Questions from the Commission,* ITC Doc. 16, List 2, at 15; *Post Conference Brief of GE,* ITC Doc. 15, List 2, at 1, 3.

[81] *See Staff Report,* List 2, at A–18, A–36; ITC Doc. 114, List 1, at 41.

Venezuelan exports to the United States from the European Community.

The ITC, in its Final Report, found that the domestic industry was "improving but still vulnerable" to the threat of unfairly traded EC rod from Venezuela.[82] From the face of the Final Report, it is difficult to discern with precision what weight the ITC gave to each potential factor that led to the threat of injury determination. Given the vagueness of the ITC Final Report, this Court can only examine the salient issues and determine whether they were based on substantial evidence.

The Court need not, however, find that the ITC's conclusions were not based on substantial evidence on every issue—especially because the ITC was not specific in its Final Report. For example, this Court may find that the ITC conclusion on a particular issue is based on substantial evidence. It does not follow, however, that that consideration alone, or in conjunction with others is substantial evidence of threat. The silence or opposition of every member of the industry except the petitioner, the petitioner's own publicly disclosed statements, and the evidence cited by the ITC in its Final Report do not add up to substantial evidence of threat of injury.[83]

The ITCs decision is based in part on performance levels in 1984 (when the petitioner controlled Sural) and on an inference that the improved performance of the industry may have been caused by the institution of the underlying investigations and consequent reduction in imports from Venezuela.[84] Additionally, the Commission dedicates the penultimate paragraph of the majority opinion to the supposition that changes in the European Community import laws would result in a diversion of Venezuelan imports to the United States, thus contributing to the threat.

This Court has already discussed why the ITC's choice of 1984 as the bellwether of health in the domestic industry for the entire period of investigation distorts and ignores larger trends in the decade that are well documented in the record. This Court need not decide whether the ITC's consideration of the pending investigation in influencing the improvement of the domestic industry was proper in this case because at least several key factors in the record indicate that no correlation can reasonably be drawn between the investigation and the improvement of the industry.

If the subsidized imports at less than fair value had a negative effect on the price adder, for example, one would expect the adder to go down upon entry of the imports and to recover upon initiation of the investigation. In fact, the fabrication adder, which is the charge to the buyer of converting primary aluminum to aluminum rod, trended up since mid

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[82] *Final Report*, List 1, at 11.

[83] This Court does not preclude, *a priori*, a finding of injury or threat of injury in any case where there is feeble industry support for a petition.

[84] Once again, the Commission has not provided any citation for this proposition. *See Final Report*, List 1, at 11.

1984, when Venezuelan imports increased.[85] Thus, domestic companies were able to maintain and even increase charges over raw material during the period of investigation. This observation is in harmony with the fact that the industry began contracting and then experienced severe shortages of EC rod. In any event, the record shows nothing but improvement since June of 1987. The initiation of the investigation in 1987 appears to have had no effect whatsoever on this trend.

Similarly, The Court has examined the record with respect to the potential effect of the petition on domestic sales. Since late 1987, virtually every U.S. smelter has been operating at capacity.[86] The issue of whether the U.S. producers regained sales volume as a result of the investigation drops out when the U.S. producers are operating at maximum capacity. They could not have sold more rod if they wanted to.

The Commission has not even suggested that there is any evidence in the record that the initiation of this investigation caused Venezuelan imports to decrease so that the U.S. industry would be able or obligated to operate at maximum capacity. Indeed, the slight decrease in Venezuelan imports was inconsequential in view of the total tonnage produced annually in the U.S. market. In sum, this Court holds that the conclusion of the ITC that the investigation itself contributed significantly to the improvement in the domestic industry is not supported by substantial evidence on the record.

The Court next turns to the ITC's reliance on the assertion in *Southwire's Post Conference Brief* regarding the diversion of Venezuelan imports from the European Community to the United States because of import ceilings and tariffs in the Community. The specific contention was that "[r]eportedly, Venezuela has already exceeded the nondutiable quota for 1988." *Final Report* at 16 n.44; *Southwire Post Hearing Brief* at 9–10. Nowhere in the record was this information developed in such a way to justify its inclusion in Southwire's *Post Hearing Brief.* The Commission made the double error of accepting this information and then rejecting Sural's rebuttal information regarding the European Community tariff and quota schemes. *See Suramerica de Aleaciones Laminadas, C.A. v. United States,* 14 CIT 366 (1990).

It is highly questionable whether the European Community information should have been allowed at all considering that the Commission questionnaire[87] did not even mention the European Community but instead referred only to the United Kingdom. In their June 16,1988 response, the Venezuelan producers stated that [

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Southwire's *Pre-Hearing Brief,* dated June 20, 1988, contained no mention of any EEC import duty.[88] Indeed, Southwire devoted the equivalent of only two pages of its 25 page brief to the entire issue of

[85] ITC Doc. 114, List 1, at 147.

[86] *Id.*

[87] Question 10 of the ITC questionnaire issued May 2, 1988.

[88] ITC Doc. No. 72, List 1.

threat of material injury. In essence, the Commission fashioned much of the threat case in the matter at bar.[89] Even the Commission, however, only dedicated a few conclusory sentences of its Final Report to the EC duties. *See Final Report* at 16. For support, the Commission cited the second-hand assertion slipped into the Southwire *Post Hearing Brief* in apparent violation of the ITC's own regulations. *See Plaintiffs' Memorandum in Opposition to the Motion for Rehearing* at 10; 19 C.F.R. § 207.23(b) (1988).[90] The only other "evidence" in the record was two sentences in the 211-page hearing transcript, also in apparent violation of the ITC regulations. ITC Doc. 114, List 1, at 21 (Southwire sales manager asserting that EEC import controls would lead to a diversion of Venezuelan EC rod to the United States). *See id.*

Whether or not Southwire's two sentence contention regarding the potential effects of EEC import laws on the diversion of Venezuelan rod to the United States in the *ITC Hearing Transcript* put Sural on notice to respond is irrelevant, however, because as Commissioner Brunsdale points out in her dissenting opinion in the Final Report, "Petitioner has not * * * supported its argument with the facts necessary to substantiate its contention, *e.g.*, the amount of EC rod shipped from Venezuela to the Communities, the likely effect of the duty on European consumption of Venezuelan EC rod, et cetera." *Final Report,* List 1, at 56.

Southwire's assertion that the Venezuelan nondutiable quota had actually been exceeded was a new contention. None of events cited by defendants contained an assertion that the ceiling actually had been reached. *See Defendants' Motion for Rehearing* at 6–7. This Court holds this assertion inoperative to the extent Sural was not permitted rebuttal.[91] Likewise, to the extent the ITC relied on other references in the record to Venezuelan imports to Europe, Sural should have been allowed to present its rebuttal. *See Suramerica,* 14 CIT 366, 368–74 (1990). In the rebuttal letter of July 19, 1988, that plaintiffs attempted to submit, Sural presented important evidence to the Commission as to why surpassing the nondutiable quota would not result in a decrease in imports to the EEC. The Court considers Sural's July 19, 1988 letter part of the administrative record that must be considered.

In conclusion, the Court finds that the ITC improperly considered the EEC tariff information based on the following independently sufficient grounds: 1) Southwire did not support its claims with the facts necessary to substantiate its contention; 2) Sural's letter that should have

[89] In fact, given the paucity of information and argument provided by Southwire concerning threat of injury, one Commissioner actually had to ask Southwire's counsel at the hearing whether Southwire was pursuing that aspect of its claim. ITC Doc. 114, List 1, at 63.

[90] For the purposes of fairness and to promote an informed debate on the issues, the C.F.R. instructs that what is not in the pre-hearing briefs may not be used at the ITC hearing; likewise, what is not used in the hearing may not be brought up in the post hearing briefs. Since neither Southwire nor the ITC specifically questioned whether the Venezuelans exceeded their EC tariff or whether that would have the effect of diverting EC rod to the U.S., arguably Southwire was precluded from bringing that specific issue up again, at the hearing or in the post hearing stage. Southwire contends that it found out about that information very late. Even if this was true, Sural should have been permitted to rebut.

[91] Even when this sentence is added to the sentence from the hearing transcript, Southwire has not presented the requisite facts for the Commission to come to any conclusion regarding the effect of EEC import laws based on substantial evidence.

been considered by the ITC rebutted all of Southwire's claims such that no reasonable mind could find that the threat of a diversion of imports from the EEC to the United States was real or imminent.

The Court next turns to the issue of the Venezuelan EC rod producers' capacity. First, the Commission noted that capacity to produce aluminum rod domestically increased in 1984 and 1985 to a high point of 528,175 tons then declined to 466,920 in 1987 for a ten percent decline overall. *Final Report,* List 1, at 7. This is in keeping with the domestic producers' strategy to shift scarce raw aluminum to higher value-added products.

The Commission further found that the record showed that the Venezuelan rod capacity would be increasing. *Final Report,* List 1, at 13. The record clearly demonstrates that the domestic producers are selling off significant EC rod capacity The record reflects that the Venezuelans are expanding capacity. The issue is whether the Venezuelans are going to replace domestic market share to the point of posing an imminent threat of injury. Six out of seven domestic producers did not bother to place a check on a Commission questionnaire to indicate a need for the protection of the United States trade laws from this supposed threat. Moreover, the question of increased Venezuelan mill capacity must be viewed concurrently with the issue of the world supply of aluminum; if there is a scarcity of world aluminum, the Venezuelans' increased capacity cannot threaten the domestic industry with injury. Since the Commission was able to point to no evidence in the record that the Venezuelans had economically feasible access to world supplies of aluminum and six of the seven members of the domestic industry chose not to support the Southwire petition, the Commission's concern over rod capacity is not supported by substantial evidence.

In addition, the Commission has supported the finding of increased capacity by claiming that some of the Venezuelan mechanical rod mills were equipped to produce EC rod as well. *Final Report,* list 1, at 13. This claim is not supported by substantial evidence. Given the scarcity of aluminum, both domestic and Venezuelan producers have been allocating more and more of their raw aluminum to higher adder products, one of which is mechanical rod.

The Venezuelans [ ].[92]

[ ].[93]

The Venezuelans claim that [ ]. *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record* at 47. Finally, even if it were reasonable to treat a fraction of the production at this mill as idle EC rod capacity, the Commission has made no showing that the Venezuelans have been willing or able to use their significant idle capacity for EC rod that has prevailed throughout the decade. It is not logical or appropriate to count the full capacity at the new mechanical rod mill in the EC rod

[92] *See Staff Telephone Notes,* ITC Doc. 28B, List 2; *see also Staff Report,* List 2, at A-19.

[93] *Staff Report,* List 2, at A-19.

mill total. At most, the Commission may reasonably consider that the proportion of the new mill's total capacity that is capable and likely to produce EC rod is the same as [ ] That proportion was [ ]. *See Staff Report,* List 2, at A–18.

The Commission also focused on the Venezuelan aluminum industry and government program to expand smelting capacity in order to provide more aluminum for EC rod capacity. The Commission found that smelting capacity would increase 176,000 metric tons by 1989[94] and 80,000 metric tons by mid-1991, with further expansion planned through the year 2000.[95]

Venalum planned the 176,000 metric ton expansion. There is no basis in the record, however, to conclude that this increase would be available to Venezuelan EC rod producers. As the Staff concluded: "Venalum has metal commitments of [ ] of its projected capacity [ ] to be attained in mid-1989." *Staff Report,* List 2, at A–19. These commitments were directed at various export customers and negotiations in progress at the time of the Staff Report, and were likely to supersede sales to local companies. *See Staff Report,* List 2, at A–19–A–20.

The other expansion projects discussed in the Staff Report[96] were scheduled for completion many years in the future and thus do not meet the test established by *Alberta Gas Chemicals, Inc. v. United States,* 1 CIT 312, 515 F. Supp. 780 (1981), which held that unfinanced plans for expansions in capacity, scheduled for completion several years in the future, may not provide the basis for a threat determination under the statute.

The Court in *Alberta Gas* explained that the plans "were uncertain and depended upon several contingencies, and indeed, financing had not even been arranged * * *. [E]ven if [the producer] had immediately decided to expand its production facilities, production in such facilities could not commence until 1982 [two and a half years after the ITC's final determination] at the earliest, assuming there were no unforeseen delays." *Alberta Gas,* 1 CIT 312, 323–24, 515 F. Supp. 780, 791. That the Commission has shown that a mere *possibility* of injury might occur at some remote future time is not substantial evidence on the record of a "likelihood of injury." *See id.,* 1 CIT 312, 324, 515 F. Supp. 780, 791.

The link between expanded capacity and increased imports is even more tenuous in the case at bar. In *Alberta Gas,* the manufacturer hoped to expand its capacity to manufacture the product under investigation. In this case, the ITC majority speculated first that Venezuela's capacity to produce the *raw material* will increase and, then that the increased raw metal production will be channelled into EC rod production, and further yet that this EC rod would be exported to the United States. The Venezuelans' express intention to play a more important role in the U.S.

[94] *Final Report,* List 1, at 14.

[95] *Id.* at n.36.

[96] *See* Chart at A–17, *Staff Report,* List 2.

market is not substantial evidence that the Venezuelan rod threatens material injury to the U.S. industry in light of the uncertainty of the new projects (*e.g.,* lack of financing or contracts for the land) and the prior commitments outside the U.S.

As the Staff indicated, "According to Venezuelan aluminum industry officials, the Alusur project [next in time after the Venalum project] is only at the letter of intent stage, with neither land, financing, nor construction yet arranged for the project. With a 3-1/2 year turn around from engineering to start-up, smelter completion would not likely meet its projected start-up date of 1990." *Staff Report,* List 2, at A–20. In fact, given these contingencies, whether that project would go on line at all as planned was speculative.

Likewise, the "Aluyana" and "Alamsa" aluminum projects had not received financing yet.[97] All of the projects listed in the Staff Report with a scheduled completion time of 1991 and beyond were improperly considered by the ITC.[98] They clearly fail the *Alberta Gas* test for a lack of "imminence." 19 U.S.C. § 1677(F)(ii) (re

Defendants' have argued that because the Venezuelans have already begun to expand their smelting capacity, the *Alberta Gas* test does not apply and the Commission's finding of threat was proper. *Defendants' Memorandum in Opposition to Plaintiffs Motion for Judgment on the Administrative Record of the ITC and Motion to Strike (Confidential)* at 29, n.58; *Citrosuco Paulista, S.A. v. United States,* 12 CIT 1196, 1219, 704 F. Supp. 1075, 1095 (1988). Again, Defendants are clutching at straws—or rather oranges in this case.

The *Citrosuco Paulista* Court stressed that "[e]ach threat determination is based upon the facts of the particular case * * *." 704 F. Supp. at 1094. Defendants would have the Court accept an analogy between the cultivation of orange trees in *Citrosuco,* and the construction of complex industrial projects in *Suramerica.* This Court rejects this analogy for the purposes of this particular case. Moreover, the *Citrosuco* Court was impressed that the Brazilian orange growers had *already* boosted capacity by improved technology—this has not been alleged by the defendants in the case at bar. What capacity the Venezuelans *have* planned imminently, the 176,000 mt Venalum project, has already been allocated to customers outside of the United States.

In sum, the Court finds that the Commission has not based its decision that the Venezuelans would gain significant new sources of raw aluminum, either from the world market or from planned expansion of smelting capacity in the near future, on substantial evidence on the whole record; nor has the Commission established that those phantom supplies of aluminum were likely to be allocated to EC rod that was likely to be imported to the United States. The lack of substantial evi-

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[97] *Plaintiffs' Memorandum in Support of Motion for Judgment on the Administrative Record* at 53 & n. 126. Plaintiff cites to sources that confirm this Court's concern over the Commission's speculations regarding Venezuelan smelting in the 1990s and beyond. *See id.* at 53–54 n. 127.

[98] *See* Chart, *Staff Report,* List 2, at A–17.

dence, together with the information offered in rebuttal on this issue alone, seriously undermines the majority finding of threat. As noted earlier, this Court instructs the ITC on remand to bring forth any information in the record that it may find on the availability and relevance of world supplies of aluminum.

Finally, the Court considers the issues of market penetration and domestic inventories of Venezuelan rod. The Commission made much of an alarming increase in market penetration by the Venezuelans to the detriment of domestic producers. The Final Report notes that market penetration rose from seven percent in 1984 to fifteen percent in 1985 and 1986. *Final Report,* List 1, at 14.

It is curious that the Commission could find no material injury at this level of penetration – even if the Commission could assume that it remained constant at fifteen percent for 1985–88. Yet now, after several years at a stable level of market penetration, the ITC has construed the Venezuelan imports as a threat. More insidiously, the Commission's "rapid increase" in market penetration took place while Southwire was in effective control of Sural, by far the largest Venezuelan exporter.

Southwire, in its Post Hearing Brief, surmised that levels would reach between eighteen and twenty-five percent by the end of 1988. *Petitioner's Post Hearing Brief,* at 8. The Commission noted that import penetration rose from twelve to fourteen percent in the first quarter of 1988. The Court rejects the Commission's first quarter findings for 1988 as the Commission itself has asserted that the interim data is unreliable "in determining trends." Unfortunately, the Commission majority has once again adopted the speculation and conjecture of the petitioner, who has foisted this case upon the ITC and this Court.

The market penetration data are not evidence of threat, nor is the majority's analysis consistent with the Commission's other findings. This level of market penetration is consistent, however, with ample testimony in the record regarding the shortage of domestically produced EC rod and the need for purchasers such as GE to obtain the rod outside the United States borders.[99]

The Commission also expressed concern with respect to increased imports regarding Sural's acquisition of wire and cable plants in the United States. Sural plans to supply these plants mostly with Venezuelan rod. *Final Report,* List 1, at 15. As the Court discussed *infra,* many of these plants were already being supplied either by the Venezuelans or the American companies that abandoned and sold the plants to the Venezuelans, and that did *not* support the petition.[100]

The Commission contends that Venezuelan inventories increased substantially in the United States during 1987 and first quarter 1988, from negligible levels in 1984–1986. *See Staff Report,* List 1, at A–51; *Staff Report,* List 2, at A–77. In fact, the Commission was relying on end-

[99] *See e.g., Statement of Mr. Robertson,* Corporate Contracting Agent, Aluminum, General Electric, ITC Doc. 114, List 1.

[100] *See* note 46, *infra, Plaintiffs' Brief* at 57.

of-period inventories reported by importers. U.S. producers generally do not inventory the imported rod because it is earmarked immediately for wire and cable production. The Court notes that [ ] values reported for 1984, 1985, and 1986 support this Court's earlier analysis regarding the shortage of EC rod in the domestic market and the need for imports. Although the jump in end-of-period inventory was substantial in 1987 in relation to 1986 levels, it was not substantial in light of the size of the U.S. market. *See id.* at A–77 ([ ] in a market of 400,000). Moreover, the Court notes that Venezuelan imports began trending downward significantly in 1986 – long before the investigation was initiated. *See Staff Report,* List 2, at A–79 (table 19: 1984–87).

Conclusion

The Commission majority based its determination of threat of material injury on a number of factual findings. Those findings were not based on substantial evidence in view of the whole record. The lack of support of six out of seven domestic producers for the petition, as well as the opposition of Alcoa and the major union in the industry and Southwire's own optimistic (or disingenuous) SEC registration filing loom heavily over what one Commissioner has conceded was a close call on threat. In short, the factual findings upon which the majority based its determination – even if some of those findings were correct and supported by substantial evidence were insufficient as a matter of law to support a determination of threat of material injury under the statute. To the extent that any threat might exist in the future, the ITC Report did not establish, based on substantial evidence, that the threat was "real" or "imminent."

The Court is well aware of the executive branch's dislike for judicial review in trade cases. Indeed, from one point of view, trade matters are political matters, and therefore should not be subject to judicial review. Nonetheless, this Court will not abdicate its congressionally and constitutionally mandated duties of judicial review in order to entertain the pursuit by Southwire of a personal business vendetta veiled in speculation, conjecture, and distortion regarding Venezuelan imports of EC rod. In the view of the Court, this case was *not* a "close call."

Meanwhile, the Venezuelan companies have been laboring under severe duties for five years. A speedy resolution of this matter is the only way to preserve an all but hollow victory for the Venezuelan plaintiffs in this five year ordeal.

(Slip Op. 93–36)

UNITED STATES, PLAINTIFF *v.* DANTZLER LUMBER & EXPORT CO., A FLORIDA CORPORATION (A/K/A DANTZLER LUMBER & EXPORT CO., INC. A/K/A DANTZLER LUMBER AND EXPORT COMPANY A/K/A DANTZLER LUMBER & EXPORT CO. A/K/A DANTZLER LUMBER & EXPORT INC. A/K/A DANTZLER BUILDING SPECIALTIES, INC. A/K/A DANTZLER BUILDING SPECIALTIES DIV., INC.), AND ANTONIO D. GODINEZ, DEFENDANTS

Court No. 90–11–00600

[Defendants' motion for certification of an interlocutory appeal denied.]

(Dated March 15, 1993)

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, U.S. Department of Justice, Civil Division (*Patricia L. Petty*) for the plaintiff.

Fotopulos, Spridgeon & Perez, P.A. (*Thomas E. Fotopulos*) for the defendants.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* On January 7, 1993, the court entered a second scheduling order to the effect that the parties complete discovery and all pretrial preparations herein on or before March 19, 1993 and then submit a proposed pretrial order in conformity with Slip Op. 92–222, 16 CIT ____, ____ F.Supp. ____ (Dec. 15, 1992), along with any suggested questions for veniremen on *voir dire* and any requests to charge the jury selected. In Slip Op. 92–222, familiarity with which is presumed, the court had decided the legal issues raised by both sides *in limine.*

Come now the defendants, praying for certification of that opinion and order for immediate appeal pursuant to 28 U.S.C. § 1292(d)(1).[1] The issues they posit for such certification are stated to be:

> 1. Whether the definition of "fraud" set forth [in] 19 C.F.R. Part 171, App. B(B)(3), in effect during the years 1984 through 1986, requires the Government to prove a higher level of intent in civil fraud prosecutions under 19 U.S.C. § 1592 than that required for criminal prosecutions under 18 U.S.C. § 541 and/or 18 U.S.C. § 1001;
>
> 2. Whether the Government's failure to reliquidate an entry within the time periods set forth in 19 U.S.C. §§ 1514(a), 1520(c), and/or 1521, causes such an entry to be finally and conclusively liquidated in the classification and at the rate and amount of duty charged, or whether the Government may still challenge the classification, rate and amount of duty so liquidated, by filing an action under 19 U.S.C. § 1592 within the time periods set forth in 19 U.S.C. § 1621[; and]

[1] This section provides in part that when any judge of the Court of International Trade, in issuing an * * * interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

> 3. Whether a civil fraud prosecution under 19 U.S.C. § 1592, following a criminal prosecution for the same acts under 18 U.S.C. § 541 and 18 U.S.C. § 1001, violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, regardless of the actual penalty imposed in the civil prosecution under 19 U.S.C. § 1592[.]

Defendants' Motion to Certify Interlocutory Order for Appeal Pursuant to 28 U.S.C. § 1292[d](1), pp. 1–2. The argument in support of this motion is in toto as follows:

> With respect to the double jeopardy issue, * * * [it] is not only one which would materially advance the ultimate termination of this litigation, but is an issue of great public importance which the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court were unable to review following this Court's decision in *United States v. Valley Steel Products Company,* 729 F.Supp. 1356 (CIT 1990), due to the Chapter 7 bankruptcy of the defendant in that case.
>
> Defendants would respectfully contend that civil fraud prosecutions under 19 U.S.C. § 1592 may never be fairly characterized as "remedial," but are always punitive (i.e. their true purpose is deterrence or retribution), regardless of the actual amount of the penalty imposed by the court.

Id. at 2.

I

Clearly, an appeal of the kind the defendants would now pursue is not favored. As stated, for example, in *Milbert v. Bison Laboratories, Inc.,* 260 F.2d 431, 433 (3rd Cir. 1958), it is

> quite apparent from the legislative history * * * that Congress intended that § 1292 * * * should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the flood gates to a vast number of appeals from interlocutory orders in ordinary litigation.

See also C.L. Hutchins & Co. v. United States, 67 Cust.Ct. 354, C.D. 4297, 334 F.Supp. 188 (1971), and cases cited therein.

The defendants do not show that the above-enumerated issues, each of which was carefully considered in Slip Op. 92–222, warrant review now by the Federal Circuit. Determining whether or not they are "controlling" is inextricably entwined with the statutory requirement that an interim appeal materially advance termination of the litigation. *See, e.g.,* 16 Wright *et al.,* Federal Practice and Procedure § 3930 at 159–60 and n. 12 (1977 & Supp. 1992), and cases cited therein. The defendants fail to meet this burden, which requires a would-be appellant to show that immediate, final resolution of the issues sought to be raised would save time and expense. *Cf. United States v. Kingshead Corp.,* 13 CIT 961, 962 (1989):

> * * * After the final judgment, Kingshead would be able to appeal the entire result in substantially the same time as had the certifica-

> tion been granted. If the Court's decision on the merits is reversed, the subsequent proceedings on this level will take no more time than the proceedings following a successful interlocutory appeal.

See Marsuda-Rogers Int'l v. United States, 13 CIT 886, 887 (1989); *C.L. Hutchins & Co. v. United States,* 334 F.Supp. at 192. These cases reflect the widely-held view that interlocutory appeals are inappropriate when they would delay trial. *E.g., Kelley v. Secretary, U.S. Dept of Labor,* 10 CIT 114, 116 (1986); *Baranski v. Serhant,* 602 F.Supp. 33, 36 (N.D.Ill. 1985); *Gross v. McDonald,* 354 F.Supp. 378 (E.D.Pa. 1973); *Struthers Scientific & Int'l Corp. v. General Foods Corp.,* 290 F.Supp. 122, 130 (S.D. Tex. 1968); *Cataldo v. E.I. duPont de Nemours & Co.,* 253 F.Supp. 235, 237 (S.D.N.Y. 1966). Here, with trial imminent, the defendants fail to persuade this court that certification would materially advance that process.

Defendants' motion also lacks convincing support for the proposition that the issues they seek to certify are ones for which there is "substantial ground for difference of opinion". The argument that a higher level of intent is required for fraud in civil, as opposed to criminal, actions clearly contravenes teaching on the matter to date. As for the issue of whether the government's failure to reliquidate within its statutory timeframe acts as a bar to seeking penalties under 19 U.S.C. § 1592, the defendants already have had a fair opportunity to make their point in not one, but two, courts, neither of which accepted it as dispositive. Thus, this too is not an issue which appears to present the requisite potential for difference of opinion. The issue regarding double jeopardy is, perhaps, more open to interpretation. However, that the *Valley Steel* decision was not appealed due to the subsequent bankruptcy of the defendant is not, in itself, an adequate reason to appeal the issue now, and the defendants do not offer any other ground. In short, they have failed to support their position that a basis exists for substantial difference of opinion on the three issues presented in their motion such that immediate consideration by the court of appeals is warranted.

II

It bears repeating that, if trial proceeds as ordered, the defendants thereafter will have an open avenue for appeal of any adverse judgment. Their motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(1) before such time must be, and it hereby is, denied. The schedule established on January 7, 1993 remains in full force and effect.

(Slip Op. 93–37)

UNITED STATES, PLAINTIFF *v.*
NEMAN BROTHERS & ASSOCIATES, INC., DEFENDANT

Court No. 92–03–00183

(Dated March 16, 1993)

ORDER

MUSGRAVE, *Judge:* Plaintiff moves to strike defendant's January 12, 1993 Answer on the grounds that defendant corporation may not proceed *pro se* as a corporation. The few courts that have carved out narrow exceptions in such circumstances have noted that "[a] virtually unbroken line of state and federal cases has approved the rule that a corporation can appear in court only by an attorney." *In re Holliday's Tax Services, Inc.,* 417 F. Supp. 182, 183 (E.D.N.Y 1976) (carving out a narrow exception for a closely held corporation that filed in bankruptcy).

From a legal viewpoint, a corporation is an artificial entity that exists only in the contemplation of the law; it can do no act, except through its agents. *Brandstein v. White Lamps, Inc.,* 20 F. Supp. 369, 370 (S.D.N.Y. 1937); *Eagle Assoc. v. Bank of Montreal,* 926 F.2d 1305,1308 (2nd Cir. 1991). Accordingly, since a corporation can appear only through its agents, those agents must be acceptable to the court; attorneys at law, who have been admitted to practice, are officers of the court and subject to its control. *Brandstein,* at 370.

From a practical viewpoint:

> "the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court. The lay litigant frequently brings pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, *e.g.,* to avoid litigating unfounded or vexations claims."

Jones v. Niagara Frontier Transp. Authority, 722 F. 2d 20, 22 (2nd Cir. 1983). Whereas a person's day in Court is more important than the mere convenience of the judges, nothing in the record has persuaded this Court that defendant would be excluded from the courts if it is required to appear by a lawyer in this case. *See In re Holliday's Tax Services, Inc.,* at 183. In fact, based on what has already been submitted to the Court, including defendant's crudely drafted *pro se* Answer, the Court is convinced that defendant's financial interests would best be preserved by representation by competent legal counsel.

If the government has acted unreasonably in this case, as defendant asserts, and if defendant prevails before this Court, he may recover reasonable legal fees from the government under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (1992). The EAJA provides for an

award of reasonable attorney's fees and costs to the prevailing party in any civil action other than cases sounding in tort, including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A) (1992); *see Nakamura v. Heinrich,* ___ CIT ___, Slip Op. 93–21 (February 17, 1993) at 2.

Upon reviewing plaintiff's motion to strike defendant's answer, it is hereby

ORDERED that plaintiff's motion is hereby granted; and it is further

ORDERED that defendant's January 12, 1993 answer to the first amended complaint shall be stricken from the Court's filings. Defendant shall be permitted sixty days from the date of this order to refile the appropriate answer or otherwise dispose of this case.

(Slip Op. 93–38)

RICO IMPORT CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–01–00070

[Defendant's motion to amend the order attached to Slip-Opinion 92–146 is granted.]

(Dated March 18, 1993)

Glad & Ferguson (*Edward N. Glad*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Carla Garcia-Benitez*); *Arlene Klotzko,* Office of Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION AND ORDER

CARMAN, *Judge:* Defendant moves to alter or amend the order attached to the judgment in Slip-Opinion 92–146, issued on August 27, 1992. The proposed alteration or amendment would replace the order's final paragraph with the following:

> ORDERED, ADJUDGED AND DECREED that plaintiff shall pay the United States the difference between the amount originally assessed upon the liquidation of the imported merchandise, and the amount found to be owing upon reliquidation, as well as interest on that amount, at the rate provided by 28 U.S.C. § 1961(1988), from the date of this order, August 27, 1992, up to the date of payment.

In essence, the government seeks post-judgment interest on amounts due from the plaintiff from the date of judgment.

Plaintiff, however, contends defendant is not entitled to post-judgment interest. Plaintiff asserts post-judgment interest is not available

to defendant for the following reasons: (1) there is no statutory authority for awarding the government post-judgment interest in the Court of International Trade when the government is a defendant; (2) the interest due, if any, is only available when the amount owing has been ascertained upon reliquidation; and (3) because the government has delayed reliquidating the subject merchandise, equity and fairness require the Court to strictly adhere to 19 U.S.C. § 1505(c) and allow plaintiff to pay any amounts owing without interest from the date of reliquidation. For the reasons set forth below, the Court does not find plaintiff's contentions persuasive.

Post-judgment interest is available "on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a) (1988). This Court has consistently recognized the availability of post-judgment interest to prevailing parties under 28 U.S.C. § 1961(a). *See United States v. Imperial Foods Imports,* 11 CIT 254, 256, 660 F. Supp. 958, 961, *aff'd,* 6 Fed. Cir. (T) 37, 834 F.2d 1013 (1987); *United States v. B.B.S. Elects. Int'l, Inc.,* 9 CIT 561, 567–68, 622 F. Supp. 1089, 1095 (1985); *United States v. Atkinson,* 6 CIT 257, 261–62, 575 F. Supp. 791, 795 (1983); *United States v. Servitex, Inc.,* 3 CIT 67, 68, 535 F. Supp. 695, 696 (1982). Notwithstanding the clear statutory authority for awarding post-judgment interest in this Court, "even in the absence of statutory authority, interest may be recovered on money due the United States." *United States v. Goodman,* 6 CIT 132, 139–40, 572 F. Supp. 1284, 1289 (1983) (citing *Billings v. United States,* 232 U.S. 261 (1914) and *United States v. Abrams,* 197 F.2d 803, 805 (6th Cir.), *cert. denied,* 344 U.S. 855 (1952)).

In addition, case law indicates post-judgment interest is available in the Court of International Trade as a matter of right to prevailing parties. The Court does not have to assess the equities of awarding post-judgment interest as it would when making a discretionary award of *pre-judgment* interest. *See, e.g., Imperial Foods Imports,* 11 CIT at 256–57, 660 F. Supp. at 961 (contrasting the general availability of post-judgment interest under 18 U.S.C. § 1961 and the discretionary availability of pre-judgment interest based on the equities); *B.B.S. Elects. Int'l.,* 9 CIT at 567, 622 F. Supp. at 1095; *Atkinson,* 6 CIT at 261–62, 575 F. Supp. at 795–96. Accordingly, the Court finds defendant is entitled to post-judgment interest as of the date of the Court's judgment on August 27, 1992.

Conclusion

The Court holds defendant is entitled to post-judgment interest on the difference between the duties originally assessed upon the liquidation of the imported merchandise and the amount found to be owing upon reliquidation from the date of judgment, August 27, 1992.

It is hereby ordered that the order accompanying Slip Opinion 92–146 shall be amended as follows: (1) the order's final paragraph that reads "Ordered, adjudged and decreed that Plaintiff shall pay the United States the difference between the amount originally assessed upon the

liquidation of the imported merchandise and the amount found to be owing upon reliquidation" shall be deleted; and (2) the order's final paragraph shall now state "ORDERED, ADJUDGED AND DECREED that Plaintiff shall pay the United States the difference between the amount originally assessed upon the liquidation of the imported merchandise, and the amount found to be owing upon reliquidation, as well as interest on that amount, at the rate provided by 28 U.S.C. § 1961(1988), from the date of this order, August 27, 1992, up to the date of payment."

Abstracted Classification Decisions

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/27 3/17/93 Aquilino, J.	E. Gluck Corp.	84–07–01040	716.09 through 716.45, 715.05, etc., Various rates	688.40, 688.45 688.43, 688.42 etc., Various rates	Belfont Sales Corp. *v.* United States 878 F.2d 1413 (1989), or Texas Instruments *v.* United States 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

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